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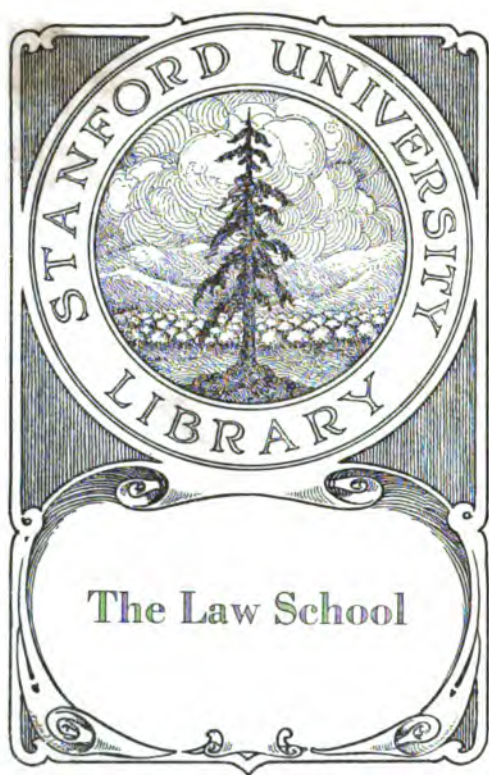
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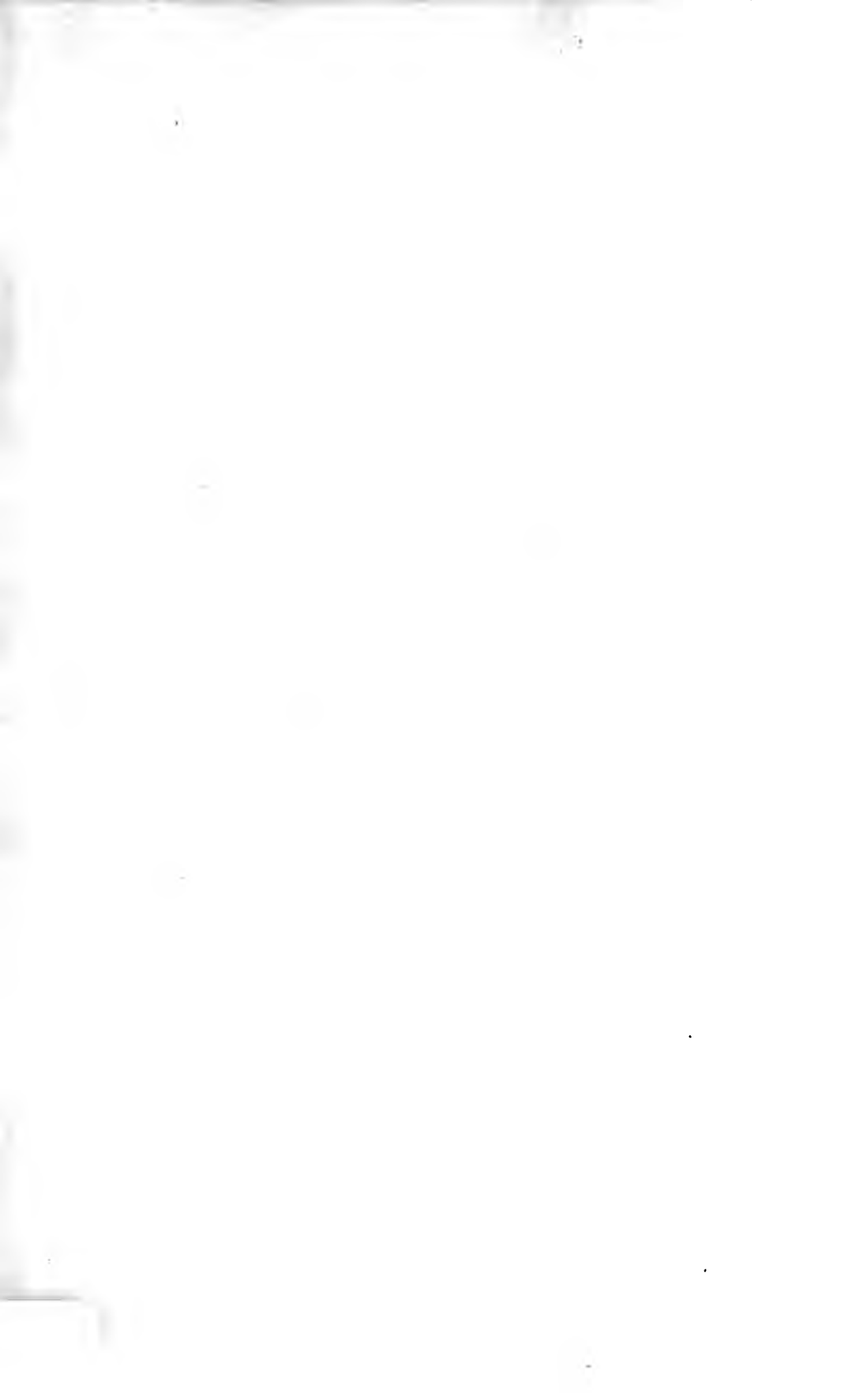
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REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
English Courts of Common Law.

HERETOFORE CONDENSED BY
HON. THOMAS SERGEANT AND HON. THOMAS M'KEAN PETTIT.

Now Reprinted in Full.

William Pitt

VOL. XLIX.

CONTAINING

The Registration Cases in the Court of Common Pleas, from Michaelmas Term, 1844, to Easter Term, 1845, both inclusive; and other Cases from Hilary Vacation to Michaelmas Term, 1844, both inclusive.

PHILADELPHIA:
T. & J. W. JOHNSON & CO., LAW BOOKSELLERS,
NO. 535 CHESTNUT STREET
1865.

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CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

WITH

TABLES OF THE NAMES OF THE CASES ARGUED, AND OF
THE PRINCIPAL MATTERS.

BY

JAMES MANNING,

SERJEANT AT LAW,

AND

T. C. GRANGER,

OF THE INNER TEMPLE, ESQUIRE, BARRISTER AT LAW.

VOL. VII.

THE REGISTRATION CASES FROM MICHAELMAS TERM, 1844, TO EASTER
TERM, 1845, BOTH INCLUSIVE.

OTHER CASES FROM HILARY VACATION TO MICHAELMAS TERM, 1844,
BOTH INCLUSIVE.

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1865.



JUDGES

OF

THE COURT OF COMMON PLEAS,

DURING THE PERIOD COMPRISED IN THIS VOLUME

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Knt., Ld. Ch. J.

The Hon. Sir THOMAS COLTMAN, Knt.

The Hon. Sir WILLIAM HENRY MAULE, Knt.

The Hon. Sir CRESSWELL CRESSWELL, Knt.

ATTORNEY-GENERAL.

Sir F. POLLOCK, Knt.

SOLICITOR-GENERAL.

Sir W. W. FOLLETT, Knt.



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CASES

UPON APPEALS FROM THE DECISIONS OF REVISING
BARRISTERS.

ARGUED AND DETERMINED

IN THE


COURT OF COMMON PLEAS,

IN

Michaelmas Term, Hilary Term, Hilary Vacation, and Easter Term,

IN THE

EIGHTH YEAR OF THE REIGN OF VICTORIA.


BOROUGH OF TEWKESBURY.

WHITHORN, Appellant; THOMAS, Respondent. *Nov.* 18.

A., a freeman of the borough of T., resided with his wife and family, and carried on his business of wine-merchant at G., more than seven miles from T. He paid 9d. a week for the use of a bedroom and a dark closet in the house of a friend at T., A. keeping the key of the closet, in which he deposited wine-samples. He slept in the bedroom twelve times in the six months next before the 31st of July.

Held, that A. did not reside in T. for six months before the 31st of July, within the meaning of the 2 W. 4, c. 45, s. 27.

Semble, that a statement in the case—that A. had slept in T. “*about* twelve times,” was uncertain and insufficient: but the revising barrister being present in court, the court permitted the case to be altered by him *instantly*.

Decisions of election committees of the House of Commons are not receivable as authorities, upon the argument of registration appeal cases.

CASE. The claimant was a freeman of the borough of Tewkesbury, and entitled to have his name inserted in the list of freemen for that borough, if he resided *within the borough, or within seven miles [*2 thereof, within the 2 W. 4, c. 45; and whether he did so reside, is the question for the opinion of the court.

The claimant is a wine-merchant, residing, and carrying on his business, at Gloucester, (which is more than seven miles from the borough of Tewkesbury,) where he has for many years occupied a house, in which he carries on his business, and also bonding vaults for the bulk of his stock. He is a married man, and keeps one domestic servant at his establishment at Gloucester. With the object of qualifying himself to vote for the borough of Tewkesbury, the claimant has, since the year 1844, paid to Mr. Sproule, a friend of his, and also agent for one of the sitting members for the said

borough, the sum of 9*d.* a week for the use of a furnished bedroom in Mr. Sproule's house, situate within the said borough, and also of a closet about six feet by three, without a window, of which closet the claimant keeps the key, and in which, between January and July, 1844, he kept some wine-samples. During the same period he slept in the bedroom [about] twelve times, and during the year ending July, 1844, [about] fifteen to twenty times, on the occasion of his coming to Tewkesbury on business; but he has never taken his meals at Mr. Sproule's except on some occasions when invited to dine as a friend. Mr. Sproule never let lodgings to any other person; and he made the above arrangement with the claimant for the purpose of assisting him to qualify as a voter for the borough. I decided that the claimant had not resided within the borough of Tewkesbury, within the meaning of the 2 W. 4, c. 45, so as to entitle him to be placed upon the list of voters for that borough. If the court are of a contrary opinion, then the name of Whithorn, and that of James Gorle,—

*3] whose appeal depends upon a similar decision, and ought to be consolidated with the present,—will be placed upon the register.

~ ~ ~ ~ ~ (Signed) ~ ~ H. S. K., revising barrister

TINDAL, C. J., when the case was called on for argument, intimated that the question, which appeared to be whether the residence of the claimant was *bonâ fide* or merely colourable, was rather one of fact than of law.

ERLE, J., observed that the case distinctly found that the claimant did not reside within the borough of Tewkesbury.

Byles, Serjt., for the appellant, submitted that the question was one of law,—whether, upon the facts stated, the claimant resided in the borough.

MAULE, J., pointed out that the case was uncertain, in stating that the claimant slept in the bedroom “about twelve times;” and observed that it was impossible to say how many times was intended by that statement.

Byles, Serjt., proposed that the statement should be amended by striking out the word “about;” and that in the paragraph which stated that he slept there “about fifteen to twenty times,” the word “between” should be inserted in lieu of “about.” To which *Cockburn*, for the respondent, assented.

TINDAL, C. J. We must adhere to the course we have previously adopted. (a) We cannot allow alterations to be made in a case by consent.

*4] *Byles, Serjt., then suggested that as the revising barrister was in court, the original case should be handed to him, and that he should at once make the proposed alterations. This was accordingly done.

Byles, Serjt. The case involves three points: first, whether the residence of the claimant is colourable,—secondly, the nature,—and, thirdly, the degree,—of such residence.

First, it is no objection that the claimant resided in the borough for the

(a) See *Webb*, Appellant, and *The Overseers of Aston*, Respondents, *anté*, Vol. V. p. 14.

purpose of obtaining a vote; *Rex v. Sargent*, 5 T. R. 466. [Upon the learned serjeant also referring to *Colonel Chaytor's case*, Harwich, 1 Peckw. 389, *The Milborne Port case*, Corb. & Dan. 227, and other decisions of committees of the House of Commons collected in Elliott on Registration, pp. 198–204, 2d ed., TINDAL, C. J., said that so far as the reasoning in these cases went, it might be proper to cite them, but not as authorities.] All that is required is, that a party should have some connection with the borough. [TINDAL, C. J. The mere *object* which the party had in view in residing in the place, will hardly be insisted upon as an objection, if there was a residence *in fact*—vide post, 8. *Cockburn* assented.]

Secondly, as to the nature of the residence in this case. It would have been a sufficient *inhabitation* within the 13 & 14 Car. 2, c. 12, s. 1, and the cases decided upon that statute. The result of the authorities is, that a party is said to reside where he *lies or sleeps*. [MAULE, J. That is, where he passes the night.] In settlement cases the residence of an apprentice is, where he sleeps the last of the last forty nights of the apprenticeship; *Rex v. Castleton*, Burr. Sett. Ca. 569; *Rex v. Brighthelmstone*, 5 T. R. 188. [MAULE, J. A freeman to be entitled to vote is required *to reside [*5 in the borough for six calendar months next before the 31st of July. Can you say that sleeping there for twelve days next before the 31st of July would be sufficient?] It is submitted it would be if he had the right to sleep there during the rest of the six months, and had the *animus revertendi*. [MAULE, J. There is nothing in this case to show an *animus revertendi* on the part of the claimant. He might have had no occasion to go again to Tewkesbury.] The claimant had entered into a contract with the landlord, and had actually hired the bedroom and closet, and he kept the key of the latter. There was no necessity for an actual occupation of the bedroom.

Thirdly, as to the degree of the residence. It may be said on the other side, that if the claimant had slept only one night at Tewkesbury, it clearly would not have been sufficient. That is putting an extreme case, which may be met by supposing the case of his having slept there every night but one. This is not a question as to the *domicil* of the party. [TINDAL, C. J. It may or may not be. ERLE, J. The word “residence” may have a very different meaning in different statutes.] The learned serjeant referred also to 2 Inst. 702.

Cockburn, for the respondent. The real question is, whether the claimant, *bonâ fide*, had a place at which he slept, in Tewkesbury. One important feature in this case is, that he is a married man, living in Gloucester, where his wife and family reside. *Ubi uxor, ibi domus*.

It appears that the claimant took the room for the purpose of regaining his vote. That may be not an objection *per se*; but such a taking should be supported by strong proof of a *bonâ fide* residence. It is important also to observe that the room was taken in the house of the agent for one of the sitting members. It was, at most, but “a passage residence;” *as in [*6 *Rex v. The Duke of Richmond*, 6 T. R. 560, which is strongly in

point. [MAULE, J. The case does not state that the claimant *took* the room. It only says that he paid 9d. a week for the use of it.] It is the same thing as if he had stayed at an inn. In this view the present case is infinitely weaker than *Rex v. The Duke of Richmond*. It is altogether more a question of fact than of law. The claimant never did more than sleep at the house in question. In *Rex v. North Curry*, 4 B. & C. 953, 7 D. & R. 424, BAYLEY, J., says that the word *reside*, "where there is nothing to show that it is used in a more extensive sense, denotes the place where an individual eats, drinks, and sleeps, or where his family or his servants eat, drink, and sleep." A man undoubtedly may have more than one residence; but in this case the claimant has the mere colourable *appearance* of a residence.

Byles, Serjt., in reply. If by colourable residence is meant that the room was taken for the purpose of obtaining or preserving a vote, that is admitted to be no objection. If more is meant, the court will be governed by the same rule as the Court of Queen's Bench in special cases from sessions; and will not infer fraud where none is stated. (a) There was no final decision in *Rex v. The Duke of Richmond*. Lord KENYON, C. J., there says: "However, it is not necessary, at present, to say that this may not, on further investigation, turn out to be a *bona fide* residence: the question here is, whether these facts ought not to be submitted to the consideration of a jury, and I am clearly of opinion that they ought." There is a great difference between *residence* and *domicil*. The latter is something *more
*7] than the former, and may be quite different from it. In Story's Conflict of Laws, s. 41, it is said, "By the term 'domicil,' in its ordinary acceptation, is meant the place where a person lives or has his home. In this sense, the place where a person has his actual residence, inhabitancy, or commorancy, is sometimes called his domicil. In a strict and legal sense, that is properly the domicil of a person, where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning (*animus revertendi*)." And in s. 43, it is further said, "The French jurists have defined domicil to be, the place where a person has his principal establishment." And after referring to some other French authorities, he cites the definition of Vattel,—“a fixed residence in any place, with an intention of always staying there.” (b) But,” the learned author adds, “this is not an accurate statement. It would be more correct to say, that that place is properly the domicil of a person, in which his habitation is fixed, without any present intention of removing therefrom.” Although Gloucester was the claimant's *domicil*, he may have had a *residence* at Tewkesbury.

TINDAL, C. J. The question in this case arises upon the thirty-second section of the 2 W. 4, c. 45, which enacts that no person shall be qualified

(a) *Vide per Buller, J., in Rex v. Fillongley*, 1 T. R. 461; *per Lord Kenyon, C. J., in Rex v. Fillongley*, 2 T. R. 711, and in *Rex v. Llanbedergoch*, 7 T. R. 107.

(b) “*d'y demeurer toujours*,” *Droit des Gens*, § 218.

to vote for a borough, as a freeman, "unless he shall have resided for six calendar months previous to the last day of July" in the year in which the registration takes place within the borough. And the question is, whether, upon the case, as stated, there is enough to show that the revising barrister has come to a wrong decision,—whether the facts distinctly show a residence by the claimant within the borough of Tewkesbury. I think they do not. I do not mean to say that where the object of a residence *is to [*8 obtain a vote, that circumstance would detract from the right of the party; but the question here is, whether the claimant had a real, *bonâ fide*, residence in the borough. We must assume, that no other facts than those stated, came before the revising barrister, which, in his opinion, were material for the appellant. Then what are the facts, as stated? That the party had a residence and domicil at Gloucester, there can be no doubt; but all that appears as to the borough of Tewkesbury, is, that he paid to a friend of his the sum of 9*d.* a week for the use of a furnished bedroom and a dark closet, of which closet the claimant kept the key; and that in this closet he had some wine-samples; that between January and July, 1844, he slept in the bedroom a dozen times, and during the whole year ending July, 1844, between fifteen and twenty times.

Now, first of all, it is to be observed that the mere payment of rent would not be equivalent to a residence. The residence required by the statute, must mean an actual occupation, for some part of the time specified, by the party himself, or an occupation by his family or servants. In this case we are not informed whether the twelve nights on which the claimant slept in Tewkesbury, are or are not, distributed over the six months—they may have been the very last, or the very first, nights of that period. It is impossible, upon this dry statement of facts, that the law should pronounce that they constituted a residence in Tewkesbury. The revising barrister was the judge of the facts; and it was for him to decide whether the claimant had a *bonâ fide* residence within the borough of Tewkesbury. I think that he has come to a proper decision, and that it must be affirmed, and, in so very clear a case, with costs.

COLTMAN, J. I am of the same opinion. It appears that the claimant had entered into a contract under *which he might sleep at Mr. Sproule's house when he thought proper. That fact does not neces- [*9 sarily imply a residence. It is undoubtedly true that a party may have two or more residences. In this case the claimant had a separate domicil; and the question is, whether there was the *animus residendi* with respect to the lodging in Tewkesbury. It is no objection that the lodging was taken for the purpose of obtaining a vote; but that circumstance induces one to doubt whether there was a taking *animo residendi*. It would not invalidate the right of voting if that *animus* existed; but it serves to cast a light upon the intention of the party. Upon the whole, I think the revising barrister was warranted in the conclusion at which he arrived.

MAULE, J. I think this is a very clear case, and one which probably

but for the importunity of the appellant, would not have been brought to this court. Unless it appeared to me that the facts stated in the case clearly showed the revising barrister to be in the wrong, I should consider myself bound to support his decision. The meaning of the term *inhabitant* has been considerably extended from what it originally imported; but that is not so with the term *resident*. There cannot be the smallest doubt that the claimant in this case had not, in ordinary language, a *residence* in Tewkesbury. The question is, whether he had a residence in point of law. And I think it clear, he had not. (His lordship recapitulated the facts of the case.) The facts stated by no means make out a residence. It is possible that a party may be a *resident* in a place where he has slept only the number of nights mentioned in this case. But there are other facts for our consideration. The claimant has a wife and family at another place, where *10] he ordinarily resides. I think the revising barrister was quite *right in his conclusion, and that his decision must be affirmed, with costs.

ERLE, J. It appears to me that the question here is, whether the revising barrister was legally bound to find that the claimant was a *resident* in Tewkesbury, within the meaning of the thirty-second section of the reform act. I am not aware that the term "reside" is so used in any statute, as that the facts stated in this case could be considered as amounting to a residence. I think that in the reform act, the intention of the legislature was, that a party who obtained a vote by residing in a borough, should have some local interest there—referring to the ordinary meaning of the word *residence*, as conveying the idea of *home*. It is stated that the claimant in this case paid 9d. a week for the use of a bedroom. It does not follow from that fact that he had the exclusive right to that room. It is also stated that he slept there twelve times during a period of six months. That is a very small number of times. The fact of sleeping at a place, indeed, by no means constitutes a residence—though, on the other hand, it may not be necessary for the purpose of constituting a residence in any place to sleep there at all. If a man's family are living in a borough, and he is absent for six months, but with the intention of returning, he will still be considered as residing there. But there is nothing of that kind in this case. And the other facts stated, such as the occupation of a closet by keeping wine-samples in it, certainly will not establish a residence. Decision affirmed, with costs.

*11]

*SOUTHERN DIVISION OF LANCASHIRE.

JOHN GADSBY, Appellant; SAMUEL WARBURTON, Respondent.

Nov. 18.

"Of Poplar Grove, Didsbury," is a sufficient description of the place of abode of an objector in a notice of objection, without stating where Didsbury is situated.

"On the register of voters for the township of M.," is sufficient, although in the form given in the 6 & 7 Vict. c. 18, sched. A, No. 5, the word "parish" only is used.

Semole, that the description of the place of abode of an objector, given in a notice of objection

(under 6 & 7 Vict. c. 18, s. 7) will, in all cases, be sufficient, if it be the same as that inserted in the list of voters.

On appeals from decisions of revising barristers, the court will hear only one counsel on each side.

CASE. The respondent's name appeared on the list of persons entitled to vote in the election of any knight of the shire for the southern division of Lancashire, in respect of property situate in the township of Harpurtreay within the polling district of Manchester, and the place of his abode was correctly stated to be "Newton, near Hyde, Cheshire."

The appellant sent to the respondent, through the post, a notice of objection, as follows:—

"To Mr. Samuel Warburton, of Newton, near Hyde, Cheshire.

"Take notice, that I object to your name being retained in the Harpurtreay list of voters for the Southern Division of Lancashire. Dated this 18th day of August, one thousand eight hundred and forty-four. (Signed) John Gadsby of Poplar Grove, Didsbury, on the register of voters for the township of Manchester."

The appellant's name appeared on the register of voters for the township of Manchester; and the place of his abode was stated in the register, to be (as stated in the notice of objection) "Poplar Grove, Didsbury."

The place of the appellant's abode was truly *described in the notice of objection, to the extent to which it appeared in that notice, [12 and as he had himself described it in the register of voters; but it was urged, on behalf of the respondent, that the description of the appellant's place of abode, as it appeared on the notice of objection, was not sufficient to sustain a notice of objection against a voter on the list, for the purpose of expunging his name, though it might be sufficient on the register to entitle the appellant to have his name retained on the list, so far as the description of his place of abode affected that right.

I held the notice insufficient in fact, and that something ought to have been added to the description of the appellant's place of abode, as "Lancashire," or "near Manchester," (Didsbury being a few miles only from Manchester and a township within the polling district of Manchester,) or the like, as the case might be; and I retained the respondent's name on the list without calling upon him to prove his qualification.

It was then contended, on behalf of the appellant, that as he had described his place of abode in the notice of objection in the same words in which he had described it on the register of voters, it was sufficient, and that by law he was not bound to describe his place of abode in the notice of objection more fully, or otherwise, than he had previously described it upon the register of voters then in force.

I ruled the contrary.

The question for the opinion of the court is, whether the appellant's statement in the notice of objection of his place of abode, as he has stated it for the purpose of his own vote on the register, is, under the facts and

circumstances hereinbefore mentioned, sufficient in law to sustain the said notice against the respondent.

If the court are of opinion that the description given by the appellant in the notice of objection of his place of abode, is sufficient in law to sustain the notice against the respondent, I having decided and adjudged that description to be insufficient in fact, the name of the respondent is to be expunged from the register of voters ; otherwise to remain.(a)

(Signed) R. M., revising barrister.

Cockburn, (with whom was *Kinglake*, Serjt.,(b)) for the appellant. The questions in this case are, first, whether the description of the place of abode of the objector given in the notice of objection, is sufficient ; secondly, supposing it is not so *per se*, whether it is rendered sufficient by the fact of its being the same as that given in the list of voters published by the overseers.

First, it is submitted that the objector has sufficiently complied with the form given in schedule (A), No. 5, to the 6 & 7 Vict. c. 18, referred to by sect. 7. That form concludes thus:—“(Signed) A. B. of [place of abode] on the register of voters for the parish of —,”

The objector here has described himself as “of Poplar Grove, Didsbury, on the register of voters for the township of Manchester.” The only difference between the two is, that the objector, in order to make his notice square with the fact, has substituted the word “township” for that of “parish” given in the form. The court are bound to take notice of the existence of a township.(c) [TINDAL, C. J. Is that so? We are bound to take judicial notice of a county.(d)] At all events, the party objected to may be presumed to have notice of it. (The learned counsel was proceeding to *read a description of the township of Manchester, from the Parliamentary Gazette ; but TINDAL, C. J., said they could not receive it as an authority.) The term *township* has a legal signification ; and if the objector has given the name of the township, that is sufficient. The revising barrister considered the notice also objectionable, upon the ground that the description of the objector’s place of abode was insufficient, and that “Lancashire” or “near Manchester” should have been added. But there is no reason for such an addition ; and the latter one suggested would not have been sufficient, according to the revising barrister’s own view, as it would have been necessary to have said “near Manchester, in the county of Lancaster.” A party must be on the list of voters in order to be entitled to object. It may be that more particularity is required in the case of a claimant. [TINDAL, C. J. According to the form, the objector, certainly, is only required to state his place of abode, and that he is on the list

(a) *Vide infra*, p. 20, n. (a).

(b) The court intimated, that as by the *registration act*, (6 & 7 Vict. c. 18, s. 60,) they were directed to hear appeals in the same manner as special cases, they should hear only one counsel on each side.

(c) *Nul tiel vill* is matter to be *pleaded*.

(d) See 2 Inst 557 Com. Dig. tit. *County*, (A.)

of voters for a particular parish.] Even if there were any misdescription here, it would be cured by the 101st section of the registration act, which provides "that no misnomer or inaccurate description of any person, place, or thing named or described in any schedule to this act annexed, or in any list or register of voters, or in any notice required by this act, shall, in anywise, prevent or abridge the operation of this act with respect to such person, place, or thing; provided that such person, place, or thing shall be so denominated in such schedule, list, register, or notice as to be commonly understood."

As to the second point, the objector's place of abode is required to be given solely for the purpose of his identification. For the same reason a party who sends in a claim is bound to state his place of abode. And an objector cannot surely do better than follow the description of the place of his abode which he has inserted in his *claim, and in respect of [*15 which his name appears upon the list of voters.

Cardwell for the respondent. The question here is, not so much, whether the notice of objection is sufficient in point of fact, as whether there are facts sufficiently stated in the case from which the court must infer that the revising barrister was wrong. The revising barrister has, in effect, found that the description given was not sufficient. There may possibly be two or three Didsburys in England; and something was requisite to fix the particular place intended. The party objected to, lived in Cheshire; and for any thing that appears to the contrary, the objector may have resided out of Lancashire. The object of requiring the place of abode is not merely, as assumed on the other side, to identify the objector, as being on the list of voters; it is material with regard to the question of costs, that the party objected to may know whether the objector can pay them; or he may wish to communicate with him through the post. There is nothing stated in the case which shows, that the revising barrister was bound to find the other way.

As to the second point, the inference is that the place of abode to be given in the notice of objection, should be the actual place of abode of the objector, and not the place of abode stated in the list of voters; for otherwise the form would have been, "described in the list of voters as of," &c. The 101st section has no application; for the revising barrister has found, in effect, that the place of abode of the objector was not denominated so as to be commonly understood. An objector ought to be held to great strictness in his notice. If it be sufficient to describe himself by the same place of abode as that given in the list of voters, he will, by following the description in the list, give wrong information to *the party objected to, in the case of a change of abode since the list was made out, or of an improper description therein. [*16

Cockburn, in reply. It is sufficient if the description given of the objector's place of abode will enable the party objected to to find him out. [MAULE, J. By the 6 & 7 Vict. c. 18, s. 7, the notice of objection is

required to be in the form given, "or to the like effect."] With regard to a change of residence, the party would, in such an event, be bound to send in a fresh claim, if he was within the time limited by the act. [COLTMAN, J. He might have changed his place of abode after the list was made out and published.] Still, a description of the former place of abode would be sufficient to *identify* him. If the place of abode in the notice were different from that in the list, the party objected to might think the objector was not entitled to object, and might not appear before the revising barrister.

TINDAL, C. J. I think the proper test to which the sufficiency of this notice ought to be brought is, to try it by the form given in the schedule (A.) No. 5, to the 6 & 7 Vict. c. 18, and compare them together. (His lordship read the form in the schedule, and the notice set out in this case.) There is clearly no variance upon the ground that the objector has described himself as being on the list of voters for a "township" instead of a "parish." All that the seventh section of the act requires is, that the notice is to be "to the like effect" with the form given. Inasmuch, therefore, as there is a list of voters for the *township* of Manchester, the notice is correct in this respect.

With respect to the description of the place of abode, there is also an exact compliance with the form. The place of abode is sufficiently *17] described if it be truly *described. A place of abode is not necessarily to be described as in a *parish*. That is old law. Com. Dig. tit. *Abatement*, (F. 25.) It is said that there may be two or more Didsburys, and, therefore, that "Lancashire" should have been added; but *non constat*, there may not be two or more Didsburys in that county. The respondent, at least, should have shown that he had been misled, or put to some inconvenience, by the notice in its present form; but nothing of that kind is suggested.(a) It seems to me, therefore, that sufficient has been done, and that the decision of the revising barrister must be reversed.

COLTMAN, J. We must construe the schedule to the act in a reasonable manner. The object of the notice is, to give the party objected to reasonable information where the objector is to be found. When the place of abode of the latter, given in the notice, is the same as that in respect of which his name stands upon the list of voters, it must be taken that there are abundant means to identify him; and a more particular description is not necessary. If the objector had changed his abode after the list was made out, that might have given rise to a different question; and perhaps in such a case he ought to have afforded further information; but that is not

(a) A latent ambiguity arising out of the existence of other places bearing the same name was not alleged, and is not to be presumed. But if it had been *shown* that there was another place of the name of Didsbury in a different or in the same county, a question might have been raised as to the sufficiency of the notice of objection, whether the voter had been actually misled by it or not. An ambiguous notice cannot be set right by a verbal communication; neither, as it would seem, can it be made good, *ex post facto*, by the sagacity of the party to whom it is addressed. See further, *post*, 18.(a)

the case here, where there appears to be no difficulty or doubt as to the identity of the objector.

*MAULE, J. Although the revising barrister has found that the description of the objector in his notice was not sufficient, that may be matter of law. He has, however, stated facts from which it appears the description was sufficient. The question, whether he was right, is therefore regularly raised for our decision. [*18]

The seventh section of the registration act requires a notice of objection to be given "according to the form numbered (5) in the schedule (A.), or to the like effect." In that form, the words "place of abode" are in a parenthesis, after the words "A. B. of," in order to show that the place of abode is *there* to be inserted. And it seems to me that this means the place of abode *as inserted in the list of voters*, in order to show that the objector is on that list and entitled to object; it being absolutely necessary that the place of abode of a voter should appear on the list. Whether it would be necessary in the case of a change of abode after the list had been published to insert the latter place of abode in the notice of objection, it is not necessary to decide. The inclination of my own mind is, that it would not be necessary. I am confirmed in this opinion by the expression in the form—"A. B. of," &c. The word *of* is indicatory rather of a place *of which a party is described*, than of a place *from which a notice is sent*. In the latter case, the place is generally put without the addition of the word "of," and is used as a date. For instance, in the form given in No. 4 in the same schedule, the word "of" is not put; but it ends thus: (Signed) A. B. [*place of abode.*] In the form of notice under consideration, I think it was meant that the place of abode should be stated as given in the list of voters. (a) The *seventh section says, the notice is to be "to the like effect," with the form given in the schedule. What is the meaning of that? To effectuate the object intended by the notice; namely, to show that the objector is on the list of voters. [*19]

ERLE, J. It appears to me also, that the revising barrister was wrong in his decision, and upon both points.

The first question is, whether the description of the objector, as being on

(a) In this case, as the place of abode of the objector was sufficiently described in the list of voters, it was unnecessary to decide whether, supposing the description in the list of voters to be wholly defective, a notice of objection, following that description, would be sufficient. The reasonableness of laying down the rule so generally may well be doubted. If a person, e. g. John Smith, sent in a claim for a county vote, in which he stated his place of abode to be "London," or, if in a London list, the column headed "place of abode" were so filled up, the revising barrister would be bound to expunge the name by reason of the insufficiency of the description of the place of abode, unless a better description were supplied at the time of revision. It is difficult to see the ground upon which such a fallacious description of the place of abode in a notice of objection,—showing a patent ambiguity,—could be held good, merely because it corresponded with the equally vague statement of the objector's place of abode as appearing on the list of voters.

The case of a *latent* ambiguity may be different. Supposing it to be proved that there were two or more Didsburys situated in a distant county, that might be a fact unknown to the party, and it would be a hardship to deprive him either of his vote or of his right of objection, when he had, to the best of his information, complied with the requisites of the act.

the list of voters for a *township*, is of necessity wrong; and I quite agree in thinking it is not. On the second ground, I am of opinion that the decision of the barrister was clearly wrong. He seems to have thought that the place of abode of the objector should be stated differently in the notice of objection from that which appeared in the list of voters. It appears to me, that the "place of abode" required to be stated by the act, has the same meaning in both instances; and this, as well under the reform act as *20] under the *registration act, 6 & 7 Vict. c. 18, s. 7. And it is extremely convenient that the same description should be given; the main object of the description being that the voter may be enabled to ascertain that the objector has a right to object. (a) I am even inclined to think that if the objector retained the same place of abode as that mentioned in the list, and purposely changed the description in his notice by adding the parish, it might be invalid. Decision reversed. (b)

(a) Another, and not an unimportant, object may be, that the voter shall have an opportunity of communicating with the objector, when, upon a proper explanation, either the claim or the objection may be abandoned, without further trouble and expense being incurred. *Vide post*, 140.

(b) The most unexceptionable form to be adopted where the objector has changed his residence, and the statement as to his place of abode in the overseers' list of persons entitled to vote has thereby become at variance with the actual fact, would seem to be this,—

A. B. late of (the place of abode, as stated in the overseers' list of persons entitled to vote,) now residing at, &c.

*21]

*SOUTHERN DIVISION OF LANCASHIRE.

JOHN GADSBY, Appellant; and JAMES BARROW, Respondent.

Nov. 18.

A tenant who holds, under two different landlords, two different sets of premises, the rent of each being less than 50*l.* a year, though together they amount to more than that sum, is not entitled to a vote under the 2 Will. 4, c. 45, s. 20.

CASE. The respondent's name appeared on the list of persons claiming to be entitled to vote, &c., in respect of property situate within the township of Pailsworth, being a township within the polling district of Manchester. The respondent was objected to by the appellant.

The qualification in respect of which the respondent claimed to be entitled to vote, was described in the column of the said list headed "Nature of qualification," in the following words and figures, namely, "Occupation of land and buildings, at a rental of 50*l.* and upwards."

It appeared in evidence that the respondent occupied land and buildings, for which he paid fifty-five pounds a year, under two different landlords, to one of whom he paid a rent of thirty-five pounds per annum, and to the other a rent of twenty pounds per annum; and that he occupied the said land and buildings as tenant, and was, and is, *bonâ fide* liable to the several yearly rents aforesaid, amounting together to fifty-five pounds a year, but that he did not occupy as tenant, under one and the same landlord, any

lands or tenements for which he was or is *bonâ fide* liable to pay, to the same landlord, a yearly rent of not less than fifty pounds.

It was contended, on behalf of the appellant, that, the occupation by the respondent not amounting to a yearly renting of fifty pounds under any one landlord, he could not unite the two occupations and rents, so as to qualify him to vote as occupying tenant of lands or tenements for which he [*22 was *bonâ fide* liable to a yearly rent of not less than fifty pounds.

I was of opinion that the respondent was an occupier of lands or tenements for which he was and is *bonâ fide* liable to a yearly rent of not less than fifty pounds, within the meaning of the statutes 2 W. 4, c. 45, and 6 & 7 Vict. c. 18; and I retained his name on the said list of voters accordingly.

The question for the opinion of the court is, whether, under the circumstances mentioned and set forth in the above statement of facts, the name of the respondent was rightly retained on the said list of voters.

If the court are of that opinion, the register of voters for the said division is to stand without amendment; but if the court are of a contrary opinion, then the said register is to be amended by expunging the name of the respondent therefrom.

(Signed) R. M., revising barrister.

Cockburn, for the appellant. The question here turns upon the twentieth section of the 2 W. 4, c. 45, by which it is enacted, *inter alia*, "that every male person, &c., who shall occupy, as tenant, any lands or tenements for which he shall be *bonâ fide* liable to a yearly rent of not less than 50*l.*, shall be entitled to vote, &c., for the county, &c., in which such lands or tenements shall be situate." And the question is, whether if a party occupy several distinct tenements for which he pays rent amounting to 50*l.*, but not one rent of that amount to the same landlord, he is entitled to vote. The appellant relies upon the words of the statute, which speaks of *a* rent. Such rent cannot be made up of rents payable in respect of several holdings under different landlords. It must be one entire rent. Under the 27th section, land may be united with *a* building in order to confer a vote in a borough; [*23 but in the case of a tenant, the holding must be under the same landlord. This provision shows the importance attached to the tenancy being under the same landlord. It has been held (*a*) that a party cannot join together a house and other building for the purpose of acquiring the franchise; *Sweetman's case*, *Alcock*, Reg. Ca. 27. And this is equivalent to holding that where a term is used in the singular number, it is not competent to a party to unite different instances of the same qualification mentioned in the act.

Cardwell, for the respondent. The words of the act are not to be construed in the strict manner contended for on the other side. The spirit of the enactment is to be taken into consideration. The meaning of the section is, that the voter must hold lands, &c., for which he pays rent to the

(a) Under the *Irish Reform Act*, 2 & 3 Will. 4, c. 88, s. 7.

amount of 50*l.* The fact of his holding them *of the same landlord* is immaterial. The twenty-seventh section makes this clear beyond a doubt; for there the legislature has shown that the distinction was present to their minds, between holding under the same and under different landlords. Sweetman's case turned upon a difference in the wording of the Irish and English reform acts. The word "building" which is in the English act (2 W. 4, c. 45, s. 27) is not in the Irish act (2 & 3 W. 4, c. 88, s. 7); and it is consistent with principle that a clause omitting certain terms, is not to be construed in the same manner as one in which they are inserted. There have been analogous cases under the 6 G. 4, c. 57, which enacts "that no person shall acquire a settlement by reason of renting a tenement, &c., unless such tenement, &c., shall consist of a separate and distinct *24] dwelling-house, &c., at and for the *sum of 10*l.* a year, &c., nor unless the rent for the same, amounting to 10*l.*, be actually paid;" and it has been held, that though the word "rent" was in the singular number, it included several rents paid to different landlords; *Rex v. Tadcaster*, 4 B. & Ad. 703; *Rex v. North Collingham*, 1 B. & C. 578. The object of the reform act, which is an enfranchising statute, and therefore to be construed liberally, was to ascertain the independence of the voter by the amount of rent paid by him.

Cockburn, in reply. The settlement cases that have been cited, have no application to the present case. The ground of the decision in *Rex v. Tadcaster* was thus explained in *Rex v. Wootton*, 1 A. & E. 232, 3 N. & M. 312,—that before the 59 G. 3, c. 50, (which contained an enactment similar to that which is to be found in the 6 G. 4, c. 57,) almost any thing was considered to be a *tenement* for the purpose of conferring a settlement, and that the object of the 59 G. 3, c. 50, was to remedy that state of things by defining what was meant by a tenement. The object of the poor-law acts is, however, very different from that of the reform act. It is argued, on the other side, that because the twenty-seventh section of that act provides for the case of a holding under the same landlord, the omission of such a provision in the twentieth section shows that two or more holdings under different landlords may be joined together; but in the twenty-seventh section the only question is, as to the *value* of the premises and not the *rent*; whereas in the twentieth section the terms used imply, *ex vi termini*, that the holding should be at one undivided rent.

TINDAL, C. J. The question in this case turns upon the construction to *25] be put upon the latter part of the *twentieth section of the 2 W. 4, c. 45, which gives, for the first time, a new right of voting in counties at elections of members of parliament in three different instances. The one now in question, which is the third, depends upon these words—"who shall occupy, as tenant, any lands or tenements for which he shall be *bonâ fide* liable to a yearly rent of not less than 50*l.*" The meaning of these words, I think, is, that the tenant is to be liable to a *single* rent of not less than 50*l.* If it had been intended that divers rents might be joined to make

up that sum, it would have been easy to use the words—"a yearly rent or *reus* of not less than 50*l.*" The word "rent" does, in point of law, denote a *redditus* for one demise.

It is of importance to see to whom the section gives the right of voting in the two other cases. In the first, it is given to any person "who shall be entitled, either as lessee or assignee, to any lands or tenements, whether of freehold or of any other tenure whatever, for the unexpired residue, whatever it may be, of *any term* originally created for a period of not less than sixty years, (whether determinable on a life or lives, or not,) of the clear yearly value of not less than 10*l.* over and above all rents and charges payable out of, or in respect of, the same." In that case there can be no doubt that the requisite holding could not be made up of distinct and different terms, each of a smaller value than 10*l.* So, with regard to the second instance, of a tenancy "for the unexpired residue, whatever it may be, of *any term* originally created for a period of not less than twenty years, (whether determinable on a life or lives, or not,) of the clear yearly value of not less than 50*l.* over and above all rents and charges payable out of, or in respect of, the same." In both of these instances the description is of a right to vote in respect of a *single term*. Then comes the third case, which is now under consideration. *And I can see no reason why [26 the legislature, in this case, should have contemplated a tenure under different landlords, when in the former cases it is required to be under the same landlord. If, therefore, this clause is taken alone, it appears to me that the party must show a liability to a *single rent*. And, advertng to the twenty-seventh section, I think the difference of the wording of that clause rather supports the construction I have laid down with respect to the twentieth section. In the twenty-seventh section there is no mention of rent. The words are, that every person "who shall occupy, &c., as owner or tenant, any house, &c., being either separately, or jointly with any land, &c., occupied therewith by him as owner, or occupied therewith by him as *tenant, under the same landlord*, of the clear yearly *value* of not less than 10*l.*" And as the *value* in that case is the measure of competency, it may have been thought necessary to say that where a building and land may be joined together, the tenancy must be under the same landlord. It is to be remarked also that the 6 & 7 Vict. c. 18, s. 73, recites that part of the twentieth section of the former act, which is now under consideration; and I think it may fairly be supposed that if there had been any intention to alter the right of voting in any respect, it would have distinctly appeared. The seventy-third section of the latter act does provide for cases of successive occupation and of joint occupation by different tenants, but, in speaking of the rent, still observes the singular number.

Upon the whole, I am of opinion that the present party is not entitled to a vote, and that the decision of the revising barrister was wrong.

COLTMAN, J. If we look merely at the words of the clause in the twentieth section of the 2 W. 4, c. 45, which speaks of "*a* yearly rent of

*27] not less than 50*l*.” *I think that if a party occupies premises under two different landlords, the one set at a rent of 40*l*. a year, and the other at 10*l*., he does not occupy any premises at “a *yearly rent* of not less than 50*l*.” Is there, then, any thing in the section itself, or in the rest of the act, to show that an occupation under different landlords was contemplated? I own I do not see any thing of the kind. It may be that the legislature intended that a tenant should not be subject to the conflicting claims of two different landlords; in which case he might be exposed to the torture of not knowing to which of them he owed allegiance. It is provided in the twenty-seventh section, that the land which may be joined with a house, or other building, in order to confer a vote for a borough, must, if occupied by the party as tenant, be held under the same landlord. That, I think, fortifies the view we are taking of the twentieth section. I am of opinion that the respondent is not entitled to vote.

MAULE, J. I also am of opinion that the respondent is not entitled to vote, as there is no occupation by him of any lands in respect of which he is liable to a *yearly rent* of not less than 50*l*., within the words of the twentieth section of the 2 W. 4, c. 45. The respondent occupied two portions of land, for one of which he was liable to a yearly rent of 35*l*., and for the other to a different rent of 20*l*. If a party takes land at a rent of 50*l*. a year, he is liable to that rent in respect of every inch of the land he has so taken. The words of the twentieth section appear to me to be very clear; and we must presume they were intended to be used in their plain sense. It is observable that this section confers the right of voting in respect of the *liability* to pay a certain rent; it is not the *value* of the land, or the *payment* of the rent, which is the criterion; and this is very peculiar. Where the *28] franchise is given in respect of *the *value* of the land occupied, the case is very different. There, the right would appear to be intended to be conferred in respect of the value, although made up of several items.

The various settlement cases that have been referred to have not much bearing upon the present case. They have a very different scope from the question here.

I think, therefore, that the name of this voter was improperly retained on the list.

ERLE, J. I am of the same opinion. The twentieth section of the 2 W. 4, c. 45, gives a qualification in respect of leasehold property; first, to tenants for sixty years, at a 10*l*. rent; (a) secondly, to tenants for twenty years, at 50*l*. rent; and, thirdly, to tenants from year to year at a 50*l*. rent; (b) and I think that in all these cases it was meant that the holding should be under one tenancy at one rent. I am fortified in this opinion by a reference to the twenty-seventh section, where the *value* of the premises is mentioned; which value might be made up of different holdings, but for the enactment that where a building and land are joined together, they must,

(a) See the argument in *Hopkins's case*, Delane, 202.

(b) See the argument in Mann. Notes of Revision Cases, 2d ed. p. 180, &c.

in order to confer the franchise, be held under the same landlord. With respect to the recent poor-law statutes, the whole tenor of their enactments, shows that the legislature intended *one* tenement to confer a settlement. But the analogy to be drawn from those statutes is not very cogent.

Decision reversed.(a)

(a) The principle of *entirety of rent*, upon which this case was decided, if carried out, will apply to the not unusual case of a party holding two or more tenements, by successive takings from the same landlord, and even to a case where several tenements are held by the same demise, but with separate renders.

*BOROUGH OF TOTNES.

[*29

CUMING, Appellant; TOMS, Respondent. Nov. 18.

Under the 6 & 7 Vict. c. 18, s. 100, a notice of objection may be posted by an agent for the objector.

And the objector himself may produce the stamped duplicate of such notice, before the revising barrister, although the notice was posted by an agent.

CASE. Francis Brooking Cuming of Fore street, in the list of voters for the parish of Totnes in the borough of Totnes, objected to the name of Francis Coaker being retained on the list of persons entitled to vote in the election of members for the said borough.

A paper writing, hereunto annexed, purporting to be a duplicate of the notice of objection stamped at the post-office on the 21st day of August last, was produced before me. The said paper had been signed by the said objector, and compared by him with the original notice, and both were addressed to the voter at his place of abode as described in the said list, and both were delivered by him to James Bosson Taylor, his clerk, to take to the post-office on the said 21st day of August.

The said James Bosson Taylor immediately left the office of the said objector, taking with him the said paper and notice, and returned within the space of a quarter of an hour with the said paper stamped with the post-office stamp, "21st August, 1844." The said notice would, in the ordinary course of post, have been delivered at the place of abode as described in the list on or before the 25th day of August last. James Bosson Taylor, being confined by illness, was unable to attend before me.

It was objected on the part of Francis Coaker, that as such alleged duplicate was produced by the objector himself, and not by the said James Bosson Taylor, the *party by whom the notice had been posted, the service of the said notice was not duly proved; and I [*30 being of that opinion, retained the name of the voter on the list. The voter did not prove his qualification.(a)

The cases of eleven other parties were consolidated with the principal case. The question for the opinion of the court is, whether, under the circum

(a) Vide post, 132.

stances mentioned in the above statement, the name of Francis Coaker was rightly retained on the said list.

If the court are of that opinion, the register is to stand without amendment. If the court are of a contrary opinion, then the register to be amended by expunging therefrom the name of Francis Coaker.

(Signed)

J. L. L., revising barrister.

Cockburn, for the appellant. The question in this case arises under the 100th section of the 6 & 7 Vict. c. 18, (a) by which it is enacted that whenever any person shall be desirous of sending a notice of objection by post, he shall deliver the same open, and in duplicate to the postmaster; "and the production *by the party who posted such notice*, of the stamped duplicate, shall be evidence of the notice having been given." The question is, whether the stamped duplicate of notice must necessarily be produced before the revising barrister by the identical party by whom the notice was posted. The obvious intention of the section was, that the objector should be enabled to avail himself of the stamped duplicate; and the production of that duplicate is made sufficient evidence of the notice having been given.(b) [TINDAL, C. J. It seems that credit is given to the stamp.]

*31] Great inconvenience would otherwise result, *and the provisions of the statute, as to this mode of serving the notice, would be rendered nugatory.

Kinglake, Serjt. for the respondent, was then called upon. The argument on the part of the appellant assumes that the production of the stamped duplicate is the only material fact to be considered; but the day and the hour when, and the place where, the notice was posted, are also material: it must be posted so as to be delivered in due course. [TINDAL, C. J. That would be matter of evidence before the revising barrister.] It could not be ascertained without fixing the time when the notice was posted; and that could only be proved by the party who posted it. It may also be important to show that the regulations as to registration, &c., which may be made by the postmaster, have been complied with. [TINDAL, C. J. What is the meaning of the *stamp* that is to be affixed to the duplicate? That would bear the date when the notice was posted. MAULE, J. It must mean the *appropriate* stamp, one which would show *when* the notice was posted.] This production of a stamped duplicate is a substitute for the former proof of service of notice, which must have been by leaving it at the place of abode of the party objected to; (c) in which case, in order to prove the service, it was necessary to give notice to produce the original notice,(d) and, in the event of its non-production, to call the party by

(a) See *Cooper*, app.; *Coates*, resp., antè, Vol. V. p. 98.

(b) Vide antè, Vol. V. p. 103, n. (b).

(c) See 2 W. 4, c. 45, ss. 39, 47, 6 & 7 Vict. c. 18, ss. 7, 17.

(d) The rule that it is unnecessary to give notice to produce a notice, does not appear to be properly applicable to cases in which the instrument, though called a notice, has a distinct legal operation. Thus, a notice to quit does not merely convey information as to the approaching termination of the tenancy, but is, itself, the determining act.

whom the notice was served. Part of this difficulty has been got rid of by the present enactment; inasmuch as another method of service has been introduced; but the party by whom that service was effected must still be called. Assuming that the stamp upon the duplicate [*32] would point out the place, and the day and hour when the notice was posted, still, as this is a statutory notice, it must be construed strictly. Throughout the registration act, where *personal* service is required, the words "deliver or cause to deliver" are used. In giving notice by post, it was clearly intended that the objector himself should be the party to post the notice. [ERSKINE, J. Is that objection raised upon the case?] It is involved in the other point. [TINDAL, C. J. If that be the true construction of the act, a party who was labouring under a fit of the gout could not make an objection.] He might adopt the other mode of service, by an agent. In sect. 3, it is said, that the clerk of the peace shall "*cause to be delivered*" his precept to the overseers; in sect. 7, which relates to the notices of objections in counties, it is said, "the objector shall give, or *cause to be given*, to the person objected to, or leave or *cause to be left*, at his place of abode, a notice," &c.; by sect. 10, the town-clerk is to "*cause to be delivered*" his precept to the overseers; and in sections 47 and 48, there is a distinction between the "*transmission*" and the "*delivery*" of the revised lists by the revising barrister. It is submitted, therefore, that the delivery of the notice to the postmaster should be by the hands of the objector himself; and that, at all events, it is necessary that the party who posted the notice should personally attend before the revising barrister, to prove the fact of such posting.

TINDAL, C. J. I can see no reason why the general maxim, which is of almost universal application,—*qui facit per alium, facit per se*,—should not apply in this case. If any inconvenience had been pointed out as likely to result from the application of that maxim in *this case*, the question [*33] would have assumed a different shape. It appears, when the stamped duplicate is produced before the revising barrister by the proper party, that faith and credit are given to the stamp affixed at the post-office. The party who posts the notice may be the principal, that is, the objector himself, or an agent employed by him for that purpose; and I also think that the party who produces the stamped duplicate before the revising barrister may be either the agent who actually posted the notice, or the principal who sent it to be posted. This construction is consistent with reason and is not inconsistent with the actual terms of the section.

COLTMAN, J. Upon a former discussion as to the meaning of this section, (a) whether a delivery at the post-office was sufficient without proving that the delivery had been made to the postmaster himself, the question was open to some difficulty; but it was ultimately held that such a delivery was sufficient. That decision is an authority for the conclusion to which we now come. No inconvenience from the course pursued on this

(a) *Croper*; appellant, *Coates*, respondent. *Anté*, Vol. V. p. 98.

occasion has been suggested ; and no satisfactory reason has been given why the objector himself should deliver and post the notice of objection ; or why, when posted by an agent, he should not produce the stamped duplicate before the revising barrister.

MAULE, J. It would require very strong words in the statute, or the conviction that manifest inconvenience would result from a contrary course, to satisfy me that the delivery of the notice of objection at the post-office must be made personally by the objector himself. There is nothing in the language of the registration *act*, (a) neither has any inconvenience been *34] suggested, to lead me to such a conclusion. I think our present ruling is quite in conformity with previous decisions ; and if we were to decide otherwise, it would lead to a very inconvenient rule. The object of the section (b) is, that the production of the stamped duplicate shall be sufficient evidence before the revising barrister of the proper service of the notice of objection.

ERLE, J. I am of the same opinion. The statute says that the party objecting shall *deliver* the notice of objection to the postmaster. (b) I think there is a sufficient compliance with this requisition if the notice is posted by an agent. It is further said (b) that the production, by the party who posted such notice, of a stamped duplicate shall be evidence of such notice having been given ; and I think it is also sufficient if the objector produces the stamped duplicate, though it was posted by an agent. And this, upon the principle, *qui facit per alium, facit per se*. The words "caused to be delivered," &c., which have been referred to, in other parts of the statute, are only used for greater caution.

Decision reversed.

(a) 6 & 7 Vict. c. 18.

(b) 6 & 7 Vict. c. 18, s. 100.

*35]

*BOROUGH OF WAKEFIELD.

NETTLETON, Appellant ; BURRELL, Respondent. Nov. 19.

Where a revising barrister having assented to the substance of a special case agreed upon between the parties thereto, but died without having finally settled the terms in which the statement should be made, the court refused to allow the case to be entered.

Whether, supposing the assent of the revising barrister to have been given to the special case in its terms, the court would allow the case to be entered without his signature after his death, *quære*.

KINGLAKE, Serjt., within the first four days of term, applied for permission to enter the appeal in this case ; but the court being of opinion that the affidavit upon which he moved was not sufficient, he obtained leave to renew the application upon an amended affidavit.

He now applied accordingly upon an affidavit which stated the following facts :—At the last revision of the lists of voters for the borough of Wakefield, the appellant objected to the name of the respondent (amongst others)

being retained upon the list; but the revising barrister disallowed the objection, and the names were retained. Due notice of an intention to appeal was given to the barrister, and he consented to grant a case for the opinion of this court, and desired the parties on both sides to prepare a statement of the facts for him to examine and settle. A statement of facts was accordingly, the same day, agreed upon, drawn up, and signed by the appellant and respondent: it was handed to the barrister, who expressed his approval of the statement, but returned it to the parties, with a recommendation that they should make some formal alterations. The parties accordingly remodelled the case in the form suggested, and the appellant having subscribed the declaration required by sect. 42, of the 6 & 7 Vict. c. 18, sent it to the barrister. The latter died shortly afterwards; and the statement of the case was found in the above state, and without his signature, among his papers, after his death.

*The learned serjeant submitted that the provisions of the 6 & 7 Vict. c. 18, s. 42, were merely directory; and that the absence of the signature of the revising barrister was immaterial, as the facts disclosed by the affidavit sufficiently showed that he had substantially approved the statement of the facts, and that the alterations which he required were merely formal. [*36]

Channell, Serjt., *contra*, was not called upon.

TINDAL, C. J. The first step requisite to support the present application does not appear to be made out; as from the affidavit, it is far from clear that the revising barrister had, in fact, approved of the case, as stated by the parties. Supposing even that the signature of the barrister might be dispensed with, his approbation of the statement undoubtedly could not be. The presumption appears rather to be that he did not quite approve of the statement; or, at least, that he entertained some doubt concerning it. Possibly he may have intended to make some alteration before signing it: otherwise he would in all probability have signed it at once. As the statement was not finally settled by the barrister, the whole matter appears to have been still *in fieri*. The case therefore is not within our jurisdiction.

The other judges agreed.

Per curiam;

Permission to enter the appeal refused.

*37] *COUNTY OF NORTHAMPTON, NORTHERN DIVISION.

DAVIS, Appellant ; WADDINGTON, Respondent. Nov. 21.

The trustees of an almshouse were empowered by letters patent of incorporation to appoint and remove twenty-four inmates, "*toties quoties sibi conveniens fore videbitur.*" Held, that the inmates appointed under this power did not take an estate for life in the property enjoyed by them as such inmates, and were, therefore, not entitled to be registered as freeholders.(a)

CASE. Thomas Waddington duly objected to the name of Thomas Davis, which appeared on the list of claimants for the parish of Rothwell, as follows :

| | | | |
|----------------|-----------|--|---|
| Davis, Thomas. | Rothwell. | Freehold houses and gardens, as principal of Jesus Hospital. | Emoluments arising out of freehold houses and lands belonging to Jesus Hospital, Rothwell, in the occupation of himself and Robert Hafford, and others. |
|----------------|-----------|--|---|

He also duly objected to the name of Robert Burbridge, which appeared on the same list as follows :

| | | | |
|--------------------|-----------|---|---|
| Burbridge, Robert. | Rothwell. | Freehold appointment as inmate of Jesus Hospital. | Emoluments arising out of freehold houses and lands belonging to Jesus Hospital, Rothwell, in the occupation of myself, Robert Hafford, and others. |
|--------------------|-----------|---|---|

He also objected to twenty-three other names appearing on the said list, whose qualifications were described in like manner.

Owen Ragsdale, deceased, left his estate, for founding an hospital at Rothwell, to five trustees who were incorporated by the name of the Governors of Jesus Hospital, *Rothwell, by letters patent, bearing date the thirty-eighth year of Elizabeth. The governors receive the rents of the estate, and pay to the principal and inmates of the hospital as follows :—To the principal, 35*l.* per annum, and to each inmate 6*s.* per week. There are now twenty-six inmates, two having been added to the original number of twenty-four, by recommendation of the charity commissioners.

In accordance with the by-laws made by the original governors, and now in force, the principal is elected by the majority of governors, and the

(a) See the next case.

inmates by such governors in rotation. The appointments are made in writing, and are generally in the following form:—

“ To ———, principal of Jesus Hospital, in Rothwell, in the county of Northampton.

“ Whereas ———, a poor man, late of your said hospital, is dead, you, the said principal, are hereby to admit ——— in the ——— in the hundred of ——— in the said county, into your said hospital, in the room and place of the said ———, deceased, it being my turn, as one of the governors thereof, to appoint a poor man to be placed in the said hospital upon a vacancy; and for so doing, this shall be to you a sufficient warrant.

“ Given under my hand and seal, this ——— day of ——— 18——.”

No instance is recorded of any principal or inmate having been expelled the hospital.

The principal has a house and garden within the hospital, and each inmate, on his appointment, is provided with a room and piece of ground, for his own separate use, of the value of more than 40s. per annum, which is generally the room and garden of the person whose death gave occasion for his appointment; but the principal exercises a discretion as to the room which the new comer is to use.

*There are also four halls in common to the inmates.

[*39

The charter of incorporation sets forth the power of the governors then being, and their successors, and a majority of them “ to elect, nominate, and assign, appoint, license, deprive, expel, and remove the said principal, and twenty-four poor and infirm men in the said hospital called Jesus Hospital in Rothwell, in the county of Northampton, from time to time to be placed there for the time being, or either of them, so often as it shall seem to be convenient to them, or the greater number of them” (*toties quoties sibi, aut eorum numero majori, conveniens fore videbitur.*)

The said charter further declares that the “ Governors shall be able to make fit and wholesome statutes and ordinances, in writing, concerning and touching the nomination, election, order, government, punishment, expulsion, amotion, and direction of the said principal and twenty-four poor infirm men, and every of them; and concerning and touching the stipends and salaries of the same principal, and twenty-four poor and infirm men, and every of them; and concerning and touching the order and government, demising, leasing, disposition, recovery, and defence and preservation of the manors, messuages, lands, tenements, and hereditaments, goods, and chattels of the said hospital.”

It then gives the same powers to the successors of the said governors, and declares that such statutes and ordinances shall not be repugnant, contrary, or derogatory to the laws, statutes, rights, or customs of the kingdom of England.

In pursuance of the powers granted by the charter, the original governors made by-laws or statutes for the election, government, and removal of the principal and poor men in the hospital: by which it is ordained, that

no principal, or poor man, shall be eligible to be admitted unless he be
 *40] forty years of age at the least, and *be unmarried; nor shall they,
 being admitted, continue in the said hospital unless they continue to
 be unmarried. The said statutes also ordain, that "when any of the poor
 or sick men shall die, resign, give over his place, or, for any offence, or
 other lawful and reasonable cause be removed," the principal shall give
 notice to the governor (whose turn it is to nominate a poor man) of the
 same. The statutes relating to the removal of the poor men, order that
 every poor man dwelling in the hospital shall work at any trade, according
 to his strength, that is not noisy or noisome, and by no means give himself
 to "idleness, drunkenness, vagrant life, or begging; and the principal shall
 inquire, and report to the governors, which of the said poor or sick men
 shall be idle, and which shall resort to the ale-house or place of great dis-
 order, to the intent that all the said governors,—or such governors, which,
 with the most part of the assistants,^(a) shall assemble at the said house, at
 some *convenient* time, by any of the governors appointed therefore, after
 reasonable notice of that time given to all the rest of governors and assist-
 ants for the time being, to examine the cause,—may instantly inflict such
 punishment upon the offenders, by abatement of their wages, expulsion or
 otherwise, as they shall think that the offence shall deserve."

It was objected that the claimants had no estate which entitled them to
 have their names retained upon the list, inasmuch as the power of amotion
 by the governors, contained in the charter of incorporation, and not ex-
 hausted or limited by the by-laws, prevented them from acquiring any
 estate of freehold by virtue of their appointment.

*41] "I decided in favour of the objection, and expunged the names
 from the list. (The cases were consolidated.)

(Signed) J. M., revising barrister.

Maunsell, for the appellant. The appointment of the principal and inmates
 of the hospital must be presumed to be an appointment for life, defeasible
 on certain conditions; they are therefore tenants for life. It is true, that by
 the charter of Elizabeth, the governors have the power of removing the
 inmates "as often as it shall seem to be convenient to them;" but the term
convenient had not the same meaning then as now. It now means commo-
 dious. In Ainsworth's dictionary the word *conveniens* is rendered "meet,
 suitable."^(b) The meaning of the charter, therefore, is, that the inmates
 may be discharged only upon suitable or proper occasions, such as their
 misconduct would give rise to. This, consequently, is not like an appoint-
 ment *durante bene placito*. The by-laws of the hospital may be taken as a

(a) The assistants are elected by a majority of the governors, and have no voice in appoint-
 ing the poor; the governors elect a governor on death or resignation, from the assistants.

(b) So, in Terence, Eun. iii. 2, 41, "*Haud convenit*," &c.

The legal meaning of the term "convenient" at the period of the charter, may be rendered
 by the words "proper" or "just," and "inconvenient" by the words "improper" or "unjust."
 Hence, these legal maxims,—"*Nihil quod est inconveniens est licitum*"—"The law will sooner
 suffer a mischief than an inconvenience;" i. e. it is better that damage should be incurred, than
 that injustice should be perpetrated.

contemporaneous exposition of the charter; and *contemporanea expositio fortissima est.*(a) The usage also is in favour of the construction contended for by the appellant. Contemporaneous exposition and usage have been resorted to even to extend the words of a grant from the crown beyond their natural import; as in *The Mayor of London v. Long*, 1 Campb. 22;—to ascertain the meaning and effect of a charter; *The Governors of Luton School v. *Scarlett*, 2 Yo. & J. 330, and in various other instances; [*42 *The Mayor of Hull v. Horner*, Cowp. 102; *Rez v. Varlo*, Id. 248. The importance of usage for such purposes is much insisted on by BULLER, J., in *Blankley v. Winstanley*, 3 T. R. 279, 288. If these parties take, as, it is submitted, they do, an estate during good behaviour, it is equivalent to an estate for life. In Cruise's Digest, *Offices*, (sect. 27,) it is said, "If an office be granted to a person *quamdiu se bene gesserit*, the grantee has an estate for life; for as nothing but misconduct can determine his interest, no one can prefix a shorter time than life; since it must be by his own act, which the law will not presume, that his estate can determine."

Byles, Serjt., for the respondent. It is to be observed that the present claim is not in respect of any particular room occupied by each inmate. It is not necessary to inquire whether, if there existed any tenancy for life in this case, it would constitute a freehold within the statutes of 8 Hen. 6, c. 7, and 10 Hen. 6, c. 2. But it is sufficient to argue that these parties have not a tenancy for life. The legal fee-simple is in a corporation aggregate, of which these parties are members; and they are therefore not entitled to vote.

Maunsell was then called upon to reply. The corporation are merely trustees for the inmates. The latter are in the position of masters of a school, or dissenting ministers appointed by trustees; (b) and by the seventy-fourth section of the 6 & 7 Vict. c. 18, trustees have no right to vote.

Byles, Serjt., was called upon in continuation. The inmates have not an estate for life. They may be *removed by the governors whenever [*43 it shall seem convenient to them. They hold their situations upon the same tenure as the king's judges did before the Revolution, who were appointed *durante bene placito nostro*. It appears from the by-laws that the inmates may be expelled for such causes as idleness or marriage; which latter example, at least, shows that the appointment was not during good behaviour.

Maunsell, in reply. At any rate, this is an interest of uncertain duration, and consequently it constitutes a tenancy for life. This rule is laid down as collected from the ancient authorities, in a note to *Wynne v. Wynne*, antè, vol. ii. 19; (c) and is also to be found in Co. Litt. 42 a. The parties here had certainly each a tenement, as the case finds that each inmate has a house and garden to himself. [*Byles*, Serjt. They do not

(a) Vide 1 Shower, 535.

(b) Vide post, 48, 49.

(c) For some of which, see post, 45, n.

claim in respect of house and garden, but in respect of the emoluments.] The real question is, whether each of them has an interest for life to the extent of 40s. a year. They have vested rights, which the court will not lightly disturb. He also referred to *Wilkinson v. Malin*, 2 Tyrwh. 544, 2 C. & J. 636.

TINDAL, C. J. It appears to me that the parties upon whose behalf this appeal has been preferred did not take a freehold estate. The patent of incorporation contains a power conferred upon the governors to nominate whom they may think proper as inmates of the hospital, and also a power to remove such inmates, which is given in the most general terms—"So often as it shall seem to be convenient to them or the greater number of them." I can scarcely conceive words of more general import than these, or conferring a wider exercise of discretion. I do not at all dissent from *44] the statement as a general proposition, that the by-laws of a corporation may be taken as an exposition of their charter. But the by-laws here give the power to remove in very general terms—the governors are empowered to remove the inmates "for any offence or other lawful or reasonable cause." One can easily conceive a reasonable cause for removal without any offence having been committed by the party, as in the case of one of the inmates becoming suddenly rich.(a) Upon the whole, I am of opinion that these parties did not take a freehold estate, and that the decision of the revising barrister must be affirmed.

COLTMAN, J. I am of the same opinion. If the terms of the charter had been different; if the words had been, that the inmates might be removed by the governors "as often as convenient," the case might have been open to Mr. Maunsell's argument; but the words are, "so often as it shall seem to be convenient to them;" and this, I think, clearly gives the trustees a discretionary power of removing the inmates.

MAULE, J. The question in this case, whether these parties took an estate for life, depends upon the nature of the interest taken by them under their appointment by the governors. The power both of appointment, and of removal, is given by the charter. I think the term *conveniens*, there *45] used, meant the same in the time of Queen Elizabeth as it meant in that of Augustus Cæsar, and as it now means in the time of Queen Victoria. The meaning of the expression is, that the governors may remove an inmate as often as it seems fit to them. An appointment of this kind never confers a right, but the party is always subject to removal at the arbitrary discretion of those by whom he was appointed. That this is the meaning of this charter is evident from the by-laws; otherwise marriage need not have been mentioned as a cause of removal. This is not like

(a) If the patent had declared, in terms, that the interest of the inmate should cease upon his becoming rich, this would not, it would seem, have affected the question of *freehold* any more than in the ordinary case in the books, where an annuity is made determinable upon the grantee's being promoted to a benefice. There appears to be no substantial difference between the breach of a condition in law—such as to behave well,—and a condition in fact,—not to become rich, or not to obtain a benefice.

those cases where there are effectual words giving an estate, with a clause of forfeiture: here, the estate is limited, in effect, to the thinking fit of the governors.

ERLÉ, J. Without discussing the question whether the property here was sufficient, I think the revising barrister was right in his decision. A power is given by the charter to appoint inmates for so long as the governors may think fit. An appointment so made—and the appointments in this case must be taken as if made in these terms—does not confer an estate for life, defeasible on a particular event. The by-laws do not, and, indeed, could not, restrict the powers of the trustees in this particular. They only point out certain instances in which their discretionary power of removal should be exercised. Decision affirmed. (a)

(a) This judgment of affirmance, in effect, asserts that the terms of the letters patent confer an absolute power on the governors to remove at pleasure, and that such a power is inconsistent with the existence of a freehold interest in the appointee. As to the former of these propositions, vide *supra* 41. As to the latter, see the long and unbroken series of decisions collected, *antè*, Vol. II. p. 19, nearly all of which appear to be tacitly overruled by the judgment in the principal case.

Lord Coke says, "If a man grant an estate to a woman *dum sola fuerit, or durante viduitate, or quamdiu se bene gesserit*, or to a man and a woman during the coverture, or as long as the grantee dwell "in such a house," (though the power of living there may depend upon the will of a third party or even of the grantor.) "or so long as he pay 10*l.*, &c., or [46 until the grantee be promoted to a benefice, or for any like uncertain time; in all these cases, if it be of lands or tenements, the lessee has, in judgment of law, an estate for life, determinable, if livery be made; and if it be rents, advowsons, or any other things that lie in grant, he has a like estate for life by the delivery of the deed; and in pleading, he shall allege the lease, and conclude, that by force thereof he was seized generally for the term of his life." (Co. Litt. 42 a; and see T. 37 H. 6, fo. 26, pl. 1, Littleton, sect. 381; *Down v. Hopkins*, 4 Co. Rep. 30), where it is said, that in *Was's* the writ shall be general—in *terris quas tenet ad terminum vite*, and the count special showing the condition annexed to the estate. Upon which Mr. Preston observes, "A limitation for such an indefinite period passes an estate for life, because the estate may continue to the end of that period, and is certainly circumscribed by it." (Preston, Estates, 405.) In the case of equitable interests, the legal seisin of the trustee, whether acquired by livery or otherwise, creates the equitable seisin of *cestui que trust*. In *Lurton v. Burton*, Lib. Ass. anno 17, fo. 49, pl. 7, it is said, that if A. grant to B., that as soon as A. comes to his manor of T., B. shall have fuel or such litter as A. shall make, though it rests in A.'s will whether he will come to T. or no; yet, if he do come, and disturbs B. from taking the fuel or litter, assise will lie, which would not be the case unless B. took a freehold interest under the grant. Where rent is granted generally, without saying for how long, a freehold passes. (*Visitor's case*, Lib. Ass. anno 11, fo. 29, pl. 8.) Lord Coke goes on thus: "A man may have an estate for term of life determinable at will. As if the king doth grant an office to one at will, and grant a rent to him for the exercise of his office for the term of his life, this is determinable upon the determination of his office." And Brudnell, C. J., speaking in the early part of the reign of Hen. 8, says, "A lease at will must be at the will of both parties; for, if it be at the will of the lessor only, it is a lease for life." M. 14 H. 8, fo. 14. Now, if a condition, that the interest of the lessee shall be determinable by an act depending upon the will of the lessor, does not destroy the freehold quality of that interest, still less will it be affected by a condition for determining the estate at the will of third persons, not parties to the grant (M. 21 H. 7, fo. 38, pl. 47, M. 14 H. 8, fo. 13, 14.)

"If I make a lease to another till I go to Westminster, the lessee has an estate for life. So, if A. lease to B. till A. makes J. S. bailiff of his manor, B. has the freehold in him; for, since there is no particular time specified, but it is left indefinitely, when I shall go to Westminster, or J. S. shall be made bailiff of the manor, and these contingencies may or may not happen during the life of the lessee, and the livery transfers the freehold [47 him, so he must, consequently, by the words of the gift, enjoy it during his life, if none of these contingencies happen in that time upon which his estate is to determine." And see 1 Roll. Abr. 6441; Bac. Abr. tit. *Estate for Life*, (A.); Dyer, 300 b, pl. 39; 10 Vin. Abr. 298,

pl. 2, 4, lb. 289, pl. 13; 2 Bla. Comm. 121; Hargrave's note to Co. Litt. 42, No. 245; *Brewer v. Hill*, 2 Anstruth. 413; *Hewlins v. Shippam*, 5 Barn. & Cressw. 221.

So an estate devised to a man exiled from Holland, for so long as he shall remain absent from Holland, is an estate for life. *Paget v. Dr. Vossius*, 1 Ventris, 325; 2 Levinz, 191. Sir T. Jones, 73; 2 Mod. 223; 3 Keble, 749. And see *Allen v. Hull*, Cro. Eliz. 238; Com. Dig. tit. *Estate*, (E. 1.) So, if I grant an annuity to A. for so long a time as he is kind, obliging, and friendly to me, A. has a freehold in the annuity. M. 7 E. 4, fo. 16, pl. 10. If I enfeoff A., upon condition that he re-enfeoff B. within ten years, A. is seised in fee during the ten years, and continues afterwards to be seised in fee until I enter for a breach of the condition; *Abraham v. Eokesby*, E. 19 H. 6, fo. 67, pl. 14.

Lord Coke says, that the law is the same as to the declaration of a use, with respect to the quantity of estate which passes; in confirmation of which Mr. Hargrave cites, from Lord Hale's MSS., a dictum of Shelley, J., in 21 H. 8, (which was before the statute of uses, and when, therefore, uses stood nearly upon the same footing as trusts at the present time;) Co. Litt. 42, note 10.

"A lease expressed to be determinable at the will of the lessor only, cannot, however, take effect as a conditional lease for life, unless the forms prescribed for the passing of a freehold interest be observed, as livery of seisin," &c.; Per Brian, C. J., of Common Pleas, M. 20 E. 4, fo. 9, pl. 4. Thus, of corporeal hereditaments, (which are said to lie in livery;) if no livery be made, the grantee takes only at will. (2 Mary, Bro. Abr. tit. *Lease*, pl. 67; *Sir W. Cordell's case*, cited 8 Co. Rep. 96 a, Cro. Eliz. 315.) So, where A. leases to B., to hold at the will of B. the lessee, if there be livery of seisin, B. has an estate of freehold for life upon condition. (T. 35 H. 6, fo. 63, pl. 3, 10 Vin. Abr. 295.) In the absence of livery, or of that which is tantamount to livery, (or in the case of a trust, in the absence of a legal freehold in the trustee,) the lessee has only an estate at will; and the tenancy, whatever be the language used in creating the demise, will be at the will of both parties. (Co. Litt. 56 a.) If A. leases his land 'until his debts are paid,' the lessee has only an estate at will, unless livery of seisin be made: with livery, he has an estate of freehold; (viz., an estate for life, determinable on the payment of the debts.) (Per Lord Coke, C. J., 3 Bulst. 300, 3 Leon. 157; *Shepp. Touchst.* *48] 270; 10 Vin. Abr. 296.) Where the freehold claimed is equitable, the seisin of the trustees countervails the livery of seisin, &c., required when a legal freehold is to be established.

In 1522, we find the law respecting freehold interests thus laid down by Brooke, Justice of C. P.: "If I let lands to one till he be promoted to a benefice; now, if he has livery, he has an estate for life upon condition (i. e. subject to the condition that the life estate shall cease upon the promotion being obtained.) So, of a lease to husband and wife during the coverture. For these estates may be made to depend upon such conditions as have a human determination (i. e. liable to be determined or put an end to by the occurrence of some event in which man is either agent or patient,) but upon no other condition; for a lease to endure so long as such a tree grows, (as had been suggested by counsel in argument,) is but at will because it is not natural (i. e. according to the known and established rule of tenure) for an estate to depend upon such like things." (M. 14 H. 8, fo. 13 a.) That the law was also the same before the passing of the 8 H. 6, c. 7, which required a 40s. freehold qualification, is evident from Bracton, who, writing in the latter end of the thirteenth century, says, that a man holds as freehold, that which is granted to him for life or indefinitely, and without any mention of time; as if it be granted until some specific thing be done. *Et sciendum quod liberum tenementum est, id quod quis tenet sibi et hæredibus suis, in feodo et hæreditate*, (that is, in fee by descent;) *vel in feodo tantum, sibi et hæredibus suis* (that is, in fee by purchase; item, *ut liberum tenementum, sicut ad vitam tantum, vel eodem modo ad tempus indeterminatum absque aliquâ certâ temporis præfinitione, scilicet, donec quid fiat vel non fiat*; ut si dicatur, *Do tibi donec ei providero*. So, again in 1329, where land was demised to A. *habendum*, whilst he paid twelve marks yearly to B., it was held that A. had freehold in the lands so demised, and that B. had freehold in the rent reserved, by reason of the uncertainty. And it was compared to the case of land being given until the donor should return from a pilgrimage; Lib. Ass. anno 3, fo. 5, pl. 9. And see *Haverhill v. Hare*, Cro. Jac. 510; *Popham*, 126, 127; 3 E. 3, fo. 15, pl. 16; *Littleton* a. 350; Co. Litt. 214 b, 218 a. The bailment of a horse to A., to ride, "until A. shall have finished his business," passes an estate in the horse for the life of A., by reason of the uncertainty, although a personal chattel; H. 17, E. 4, fo. 8, pl. 5.

Upon any inquiry into the nature of the equitable interest of a party, in property held by trustees for his benefit, it may be proper to consider what conveyance it would be *49] necessary for the trustees to execute in order to divest themselves of all legal interest in the property, for the period during which it is to be enjoyed beneficially by *cestui que trust*. *Thus, if land is held by A. in fee, upon trust, to pay the rents and profits to B.,

for so long time as B. shall teach at such a school, or say mass at such a chapel, or preach at such a meeting-house, or hold the appointment of bedesman in such a hospital, the proper course would seem to be, for A. to convey to B. or to some other person, an estate for the life of B., determinable upon his ceasing to officiate as schoolmaster, priest, or minister, or to hold the appointment of bedesman.

It would appear to make no difference, either in the form or in the substance of the conveyance of the legal estate, if the office or appointment was determinable at the mere will of a third party; as at the will of a patron, a bishop, or a congregation, or of any other individual or body of men, or even at the mere will of A., the trustee.

Where A. is seised of lands or tenements for such an estate of freehold, customary or leasehold tenure as would have conferred the right of voting on him if he had been beneficially interested, but which he holds subject to a trust under which the rents and profits, or a sufficient portion of such rents and profits to constitute the amount required with reference to the particular elective franchise, are to be paid, or a beneficial occupation is to be allowed, for an indefinite period, the *cestui que trust* would appear to be entitled to vote. So, if A. were possessed of lands or tenements, for a term of 1000 years, as trustee, the interest of his *cestui que trust* would, if indefinite, (and therefore, in contemplation of law, co-extensive with the term itself,) appear to be sufficient to confer the elective franchise on such *cestui que trust*, as a leaseholder within the 2 W. 4, c. 45, s. 20.

The nature of the qualification of Davis, the principal, is properly described in the overseers' list, and nothing which amounts to a sustainable objection is to be found in the fourth column. But with respect to Burbridge and his co-inmates, the claim appears to be insufficient in a point not amendable, or, at least, not amended. The entry is, "Freehold appointment, as inmate of Jesus Hospital." Supposing the interest of the appointees to be freeholds, still, unless the appointment conferred the right to the possession, or to the perception of the rents and profits, of lands, or tenements, they would have no right to be registered; and if the appointment did confer such right, it would be the lands, or tenements, which constituted "the nature of the qualification," and not "the freehold appointment." The qualification of a freeholder is the land or tenement of which he is seised, not the conveyance by which that land, or tenement, is held.

*COUNTY OF NORTHAMPTON, NORTHERN DIVISION.

[*50

SIMPSON, Appellam.; WILKINSON, Respondent: Nov. 21.

By the 39 Eliz. c. 5, hospitals for the poor might be incorporated. Previously to that act they could be founded by royal license or letters patent. Before the act, A. founded a hospital for certain "bedesmen," and made rules for its regulation. The bedesmen were appointed for life.

Held, that the hospital might be presumed to have been founded by license; and therefore that the bedesmen were entitled to be registered as freeholders.(a)

The court will not allow any objections to be taken upon the argument of the appeal, which are not raised in the case stated by the revising barrister.

CASE. John Dauntley Simpson, of Peterborough in the county of Northampton, on the register of voters for the northern division of the said county, for the parish of Castor, duly objected to the name of Henry Allen being retained on the register of voters for the said division.

The name and description of the said Henry Allen, on the said register for the said division, is as follows:—

| Name. | Place of abode. | Nature of Qualification. | St. Martin's Parish. |
|--------------|---|-----------------------------|------------------------|
| Henry Allen. | Lord Burghley's Hospital, St. Martin's, Stamford Baron. | Freehold tenement, or room. | Henry Allen, occupier. |

(a) See the last case.

He also duly objected to the names of twelve other persons whose qualifications, on the list of voters, were described in like manner, and depended upon the same facts.

Henry Allen was appointed, by the Marquess of Exeter, to be one of the bedesmen of the hospital hereinafter described, in the room of William Benson, deceased.

The following is a copy of the appointment, duly stamped:—"Be it known that I, the most honourable Brownlow Marquess and Earl of Exeter *51] and Baron of *Burghley, have nominated and appointed, and, by these presents, do nominate and appoint, Henry Allen of Stamford, in the county of Lincoln, to be one of the brethren of the hospital in St. Martin's, Stamford Baron, in the county of Northampton, in the room and place of William Benson, lately deceased. And I do hereby require and direct that the said Henry Allen be accordingly admitted into the brotherhood of the said hospital, and have, receive, and enjoy, all the benefits, profits, advantages, as one of the brethren thereof, he ought to have and enjoy. Given, under my hand, this 22d day of May, 1834.

(Signed) EXETER."

In the parish of St. Martin's, Stamford Baron, is a freehold building called by the name of "Burleigh Hospital," or occasionally "St. Martin's Hospital," which is divided into several rooms, each of which is respectively inhabited by a bedesman appointed under the rules hereinafter mentioned, and by which the hospital is governed. Each bedesman keeps the key of his room; and the successor of each deceased bedesman occupies the same room as did his predecessor. These rooms are on the ground-floor. The upper story of the building extends over all the said rooms, and is let as a granary, by the warden and bedesmen, at an entire rent, which they divide amongst themselves equally. Each room occupied is of the annual value of 4*l.*, independently of the rent received for the granary. The hospital is not rated to any parochial rates, nor are any of the bedesmen rated in respect of their rooms. The said Henry Allen was duly qualified for admission according to the rules and ordinances by which the hospital is governed, a copy whereof is hereunto annexed, and is to be taken as part of this case. No person appointed and admitted as a bedesman has ever been known to *52] be removed during his life. No deed, *of any description, can be found relating to the hospital. All the proper offices, and places of deposit, have been searched, and no trace of any original rules and ordinances, or of any charter, deed, or other documents, relating thereto, has been discovered; neither does any enrolment under the 39 Eliz. c. 5 exist, or any letters patent. The rules refer to certain "feoffees and their heirs;" but none are known. It was proved that the hospital was governed strictly by the printed unsigned copy of the rules and ordinances, which were produced from the hospital, where they are usually hung up in the common dining room. There is no trace of any common seal, neither does there appear to be any record of the warden and brethren suing, or being sued

in any corporate name, or of any by-laws made by them; nor have they ever been summoned on juries. The foreman, according to the ordinances, is called the warden of the almshouse of Lord Burleigh, and the other twelve, the almsmen or bedesmen. The sum of 2*l.* 14*s.* weekly is paid by the steward of the Marquess of Exeter, out of the rents of Cliffe Parks, to the warden of the hospital, for himself and the bedesmen. The Marquess of Exeter is the heir male of the body of Sir William Cecil in the copy of the ordinances mentioned, and the owner of his house, and is lord of Burghley. and he has recently repaired the hospital at his own expense.

It was contended on the part of the objector—

1st. That if the claimants had any freehold estate, they had such estate only as members of a corporation aggregate.

2d. That they had no freehold estate at all.

3d. That, even if they had any freehold estate, it was an estate in joint-tenancy in the hospital, and not a separate and exclusive estate in each room; and that the claims, therefore, were bad.

*I overruled these several objections, and retained the name of the said Henry Allen, and also the names of the said twelve other persons respectively, on the list of voters for the said parish of St. Martin's, Stamford Baron, being of opinion that, under the circumstances, a legal foundation might be presumed, not necessarily investing the claimants with a corporate character, and that they were respectively entitled to a separate freehold estate in their respective rooms. [*53]

(Signed) J. M., revising barrister

(The cases were consolidated.)

“Ordinances made by Sir William Cecil, Knight of the Order of the Garter, Baron of Burghley, for the order and government of thirteen poor men, (whereof one to be the warden,) of the hospital of Stamford Baron, in the county of Northampton, to remain in a chest in a chamber in the said hospital, locked up with two several locks, the keys whereof to remain in the custody of the vicar of St. Martin's, and the bailiff of the manor.

“*Vicesimo Augusti, anno tricesimo-nono Eliz. Reg. et anno Dom. 1597.*

“1. The first five shall be named, chosen, and admitted by me, William Lord Burghley, during my life, and after, by my heir male that shall be owner of my house, and Lord of Burghley, whereof the foremost shall be called the warden of the almshouse of the Lord Burghley.

“2. The next four, that is, the 6th, 7th, 8th, and 9th, shall be named and admitted by the vicar of St. Martin's, for the time being, the bailiff of the manor of Stamford Baron, in the county of Northampton, and the eldest churchwarden of St. Martin's, and by them that shall be in the Nunnery, otherwise called St. Michael's, and in the inn called the George, in Stamford Baron, or the greater number of them.

“3. The last four, (viz.,) 10th, 11th, 12th, and 13th, shall be named and admitted by him that shall be for the time alderman of [*54]

the borough of Stamford, in the county of Lincoln, and by the recorder of that town, the steward and bailiff of the said manor of Stamford, or the major part of them, whereof the alderman to be one.

“4. Item. The vicar of St. Martin’s, or the curate of the church, for the time being, shall keep a register in writing of the names and surnames of all the said poor men, which book shall be kept in the vestry within the chancel of St. Martin’s church, and shall be written in order, beginning with the name of the warden, and then of the first four, and following, the second four, and lastly, the last four, and shall be signed with the hands of the bailiff of the manor of Stamford Baron, and of the steward of that manor; and so yearly renewed, as cause shall require, upon the decease or change of any of the said poor men; and a duplicate of this book shall be delivered to the alderman of Stamford, to be kept with the records of the town, thereby to know how the numbers shall continue.

“5. When the warden and any other of the twelve shall die, or any of their places become void, the place of such as shall die or become void, being the warden or one of the number of the first four, shall be supplied by the lord of Burghley for the time being; and so the place of any of the second four dying, or becoming void, shall be supplied by the aforesaid vicar, and the parties authorized to name the second company of four; and the like shall be observed by the alderman of Stamford, and the others joined with him, for supplying the places of the last four as shall from time to time become void.

“6. Item. If the parties before named, or the major part of them, shall not supply the void places of such as have been first chosen by them, within twenty-eight days after the same shall be void, the same shall be supplied *55] *by any two others of them that are authorized to nominate any of the said twelve; and in default of such nomination, the lord of the house of Burghley and his heirs male shall supply the same within two months; and in default thereof, some one or two of the feoffees or their heirs, to whom the annuity of 100*l.* is granted, that shall dwell near Burghley, shall supply the same.

“7. Item. The warden of the house shall have yearly a gown cloth of three yards, and of 8*s.* per yard, and every of the other shall have every year a gown cloth of three yards, at 6*s.* 8*d.* the yard, of such colour as the livery coats of the Lord Burghley, or his heirs, shall be for the time, which shall be provided and bought by the bailiff of the manor of Stamford Baron, and by the oversight of the vicar of St. Martin’s and the alderman of Stamford.

“8. Item. In the nomination of the said warden and twelve poor men, these circumstances following shall be observed, or else none otherwise named shall be allowed:—

“9. First. Every one so to be named shall be presented in the church of St. Martin’s upon a Sunday in the forenoon, to the vicar of the said church, and by him to be allowed to be of honest Christian profession, and

able, and well disposed, to say the Lord's prayer, the creed, and to earn to answer to the ten commandments, as are prescribed to such as are catechized.

"10. Item. None shall be admitted thereto but such as shall have been born in the counties of Northampton, Lincoln, or Rutland, or that have dwelt for the space of seven years within seven miles of the borough of Stamford, except the lord of Burghley shall, for some reasonable cause, dispense therewith; neither shall any be thereto allowed that are under thirty years of age, or that hath any certainty of living above the value of 53s. 4d. by the year; nor any that is known to be *diseased of any leprosy, or the pox called the French pox; nor any drunkard, bar- [*56
rator, or infamous for adultery; these, and such like faults.

"11. Item. The said poor men shall and may, as near as may be, be chosen out of such as have been either honest soldiers, or workmen, as masons, carpenters, or other artisans of handicraft, or labourers in any work, or in husbandry, or servants that are by sickness or any other impediment unable to get their livings by their hand-work, or by daily service, as beforetime they have done; and if, after they shall be chosen to the places, any of them shall fall into such infirmities or infectious diseases, or be justly infamed or convinced of such notable vices as above in the next former article mentioned, they shall be displaced by them by whose authority they were placed, and their allowance to cease within fourteen days after their displacing; against which time their places shall be supplied by such as have displaced them.

"12. Item. None of the said thirteen poor men shall, in any alehouse, or other places, play at cards, dice, or any other unlawful game; but if, after, on a warning given to them by the vicar of St. Martin's, or of the bailiffs of Stamford Baron, or of the manor of the borough of Stamford, to forbear from such unlawful play, they shall be, the second time, committing such offence prohibited, he shall be removed from his place, and shall receive no more weekly relief; except, he acknowledging his fault, and promising of amendment, he shall be restored by the said vicar and bailiff and two other of the number that first placed him.

"13. Item. Every of these poor men shall resort, in their livery gowns, to the Common Prayers, every Sunday, Wednesday, and Fridays, and holydays, to St. Martin's church, at morning and evening prayers, and shall sit and kneel in some convenient place, appointed *by the church- [*57
wardens; neither shall any of them be absent from the church at such times, without just cause, by sickness, to be notified to the vicar, and to be allowed by him; and for every such fault not excusable, the parish clerk shall have 6d. out of his week's wages allowed him by the poor man that shall make such default.

"14. Item. There shall be paid to the said warden, and to the other twelve, by the vicar of St. Martin's, and the bailiff of the manor, in St. Martin's church, or by one of them, every Sunday, after evening prayer,

these sums following : viz. to the warden of the hospital, the sum of 3s. for the week following, and to every of the other twelve, the sum of 2s. 4d. for the week following ; saving to the parish clerk his due for the defaults before committed, if any shall be as is above expressed ; which he shall also receive at the same time.

“ 15. Item. All the poor men that shall be unmarried, and not interlusive sick, shall lodge every night in the common house, without some special impediment to be allowed by the vicar, or by the bailiff of the manor of Stamford Baron ; and such as shall be married may live with their wives out of the common house, so as the same be within the parish of St. Martin's, or within the borough of Stamford ; but yet they shall be bound, one night in a month, to lodge with their fellows in the common house, upon pain of the loss of one week's wages, which shall be paid to the poor men's box in St. Martin's church.

“ 16. Item. None of these shall go abroad in their gowns out of the bounds of St. Martin's parish, or out of the borough of Stamford and the liberties thereof.

“ 17. Item. The vicar of St. Martin's, or the minister, shall, upon the first Sunday of every quarter of the year, assemble them together in the church before evening prayer, and, severing them asunder, hear them the Lord's prayer, the creed, and to answer to the commandments ; *and
*58] such as will not, in convenient time, learn, and be able to say the same, shall be avoided from his room after fourteen days' space given him to learn the same ; and the vicar or minister shall have, for his labour, five shillings every such Sunday, and the parish clerk, twelve pence, for attending upon the vicar.

“ 18. Item. They shall, every first Sunday of every quarter, go to Burghley House, if the Lord Burghley, or the lady, his wife, shall there keep household, and there shall dine at one table together in the hall, where they shall have two messes of meat ; every mess of two dishes, one of pottage and boiled meat, and the other of roast, if it be not fasting day ; and if it be fish day, they shall have two like messes of white meat and fish ; for the charge whereof, he that shall dwell at Burghley, as the heir of the house, shall defray the same ; or else, in case of the absence of the said Lord Burghley, or the lady, his wife, from the house, payment shall be made out of the yearly sum of the annuity to the said thirteen poor men, after the rate of four pence a piece, to be paid by the bailiff of the manor, or by such as shall be authorized to receive the annuity, and to distribute it according to these orders ; and the same to be allowed upon the accompts.

“ 19. Item. If, at any time, he that shall be mine heir of my house at Theobalds, in Hertfordshire, shall come to Burghley or Stamford, the said poor men shall present themselves dutifully unto him, and shall offer any service they can do to him, in memory of the founder, William Lord Burghley, ancestor of the said owner of Theobalds.

“ 20. Item. If any doubt or question shall arise upon the words or

meaning of these former articles or ordinances, the resolution or determination thereof shall be made, and in writing delivered to the vicar of St. Martin's, by the Bishop of Peterborough, or by the dean and *any one prebendary, of the church of Peterborough; whereunto all parties shall yield and obey. [*59]

“21. Item. As these poor men shall have, at the first, their several rooms allowed them in the almshouse, so shall they, during their lives or their continuance in their places, continue their lodgings, and every one, as he shall succeed to the void places, so shall he succeed in the lodgings, without any change.

“22. Item. All the twelve shall, at their entries, openly, in St. Martin's church, promise to be obedient to the warden of the house in all things that he shall advise them for the observation of the orders of these articles prescribed; and if any of them shall wilfully refuse to observe the same, he shall complain thereof to the Lord Burghley for the time being, or in his absence, to the vicar and bailiff of the manor, who shall remove such a wilful person from the place whereunto they did first name him, and shall appoint another.

“23. Item. During the life of me, the Lord Burghley, he that shall be my bailiff of the manor of Stamford Baron, shall receive the said annuity of 100*l.* out of my lands heretofore called Cliff Park, in the county of Northampton, and, with the privity of the said alderman of Stamford, or the vicar of St. Martin's, make payments thereof according to these orders; and the rest that shall remain upon his yearly accounts, to be employed upon the repairs of the house, or upon the poor prisoners in any jail in the borough of Stamford, by the appointment of the said alderman, vicar, or recorder of Stamford, for the time being, before whom the said bailiff shall make yearly his accompts, the 2d day of November; and, after my decease, if the said alderman, vicar, and recorder of Stamford, for the time being, shall not like to continue the said bailiff for the said service, they shall name and appoint either such as shall be bailiff of the borough of Stamford, or such as shall be inhabitants in *the inn or house called the George of Stamford Baron, or in the site of Saint Michael's nunnery; or in default of them, such others as shall meet for that purpose, with the consent of the Lord Burghley, for the time being, or any two of the feoffees; which accompt shall be also yearly, after the last of November, presented to the Lord Burghley, if he shall be then residing at Burghley, or, in his absence from thence, to some one of his feoffees. [*60]

“24. Item. The said annuity shall be paid by the bailiff or farmers of Cliff, every quarter of the year, to the bailiff of the manor of Stamford Baron; (that is to say,) 25*l.* at or before the feast of St. Michael the Archangel, and so accordingly by even portions; of which said money the bailiff shall weekly make payment of the above said sums as afore is expressed; and now for the first payment he shall being the first Sunday after the feast of St. Michael, and so continue weekly.

"25. Item. There shall also be provided by the said bailiff, by the privity and consent of the alderman of Stamford and the vicar of St. Martin's, gowns for every of them, according to the value above mentioned; which shall be delivered them yearly, the Monday after the 1st Sunday after Michaelmas.

"26. Item. There shall be also, during the term of twenty-one years from the feast of St. Michael the Archangel, last past, yearly delivered out of the woods of Cliff Park, thirteen loads of fire-wood, for the said thirteen poor people abiding at the said hospital, by Roger Dale, gent., farmer, and tenant of Cliff Park, his executors or assigns; which said thirteen loads the said Roger Dale, his executors or assigns, are bound, by covenant, to cause yearly to be carried to the said hospital, at some convenient time before the feast of All Saints, and after the end of the said one and twenty years, the *61] *said quantity of wood shall be provided by the bailiff of the manor of Stamford Baron for the time being."

Byles, Serjt., for the appellant. The first question in this case is, whether the bedesmen have any estate at all. It is submitted that they have not. This question depends upon the statutes 8 H. 6, c. 7, and 10 H. 6, c. 2. By the former statute, it is declared that the electors in the counties shall be "people dwelling and resident in the same counties,(a) whereof every one of them shall have free land or tenement to the value of 40s. by the year, at the least, above all charges;" and the latter act is to the same effect. Supposing the members of this hospital do not constitute a corporation, still they have no legal estate so as to confer a vote. They would not have been summonable to the county court, nor would they have been liable to pay knights' wages. [*Hildyard*, for the respondent, stated that he should not contend they had a *legal* estate.] Neither have they an *equitable* estate. They could not sell or mortgage the property; nor would it be extendible for their debts under the statute of frauds, 29 Car. 2, c. 3, or the 1 & 2 Vict. c. 110, s. 11. [ERLE, J. Suppose they had been turned out after twenty years' possession, could they not have maintained ejectment?] It is submitted that they could not.(b) [*Hildyard*. The question before the revising barrister was, whether the estate was vested in feoffees or in a corporation; and he decided that it was in feoffees.] Assuming that to be so, still the question arises, whether an extent could issue against the estate for the debts of the bedesmen; extendibility for debt being now an incident of all equitable estates. It is impossible to read the ordinances without *62] perceiving that the bedesmen are *members of a corporation. The ordinances bear date the 21st August, 1597. An act was passed in the same year (39 Eliz. c. 5) to enable parties to endow hospitals. The regnal year commenced on the 17th November, 1596; but the act would relate to the 1st day of the session, viz. the 24th October, 1597. It appears therefore that the ordinances were made before the meeting of parlia-

(a) Repealed, as to residence, by the 14 Geo. 3, c. 58. Et vide post, 141, (a)

(b) If they could, their estate would have been *legal*.

ment, and consequently before the act would come into operation. The 39 Eliz. c. 5, after referring to a former statute, and reciting that "Her most excellent majesty, understanding and finding that the said good law has not taken such effect as was intended, by reason that no person can erect or incorporate any hospital, houses of correction, or abiding-places, but her majesty, or by her highness's special license, by letters patent under the great seal of England, in that behalf to be obtained," enacts, that any person may found an hospital, &c., "and the same hospitals or houses so founded shall be incorporated and have perpetual succession for ever in fact, deed, and name, and of such head, members and numbers of poor, needy, maimed or impotent people, as shall be appointed, assigned, limited or named by the founder or founders, his or their heirs, &c., by any such deed enrolled."

If the hospital in question was founded *before* the statute, it must have been by license or letters patent; and in that case it is a mere gratuitous act on the part of Lord Exeter to continue the charity; and consequently the bedesmen have no rights conferred upon them. If the hospital was founded *after* the statute, it must have been a corporation aggregate; and in that case the bedesmen, being members of such corporation, have no separate estate; so that either way they have no right to vote. [ERLE, J. Is it any objection that a party has a defect in his title, and that the crown might enter?] That may be an answer so far as the question of illegality *goes; but still the question remains, whether the estate was not [*63 vested in a corporation. [COLTMAN, J. If the estate was conveyed to trustees, there would be no offence against the statute of mortmain. MAULE, J. We may presume the queen's license, and we need not presume that the hospital was incorporated.]

Secondly, if they have any estate, they have not one for life. It may be admitted that this is a stronger case in this respect than that of Davis appellant, and Waddington respondent; (a) but some of the facts upon which the right of motion is to depend in this case are very singular,—such as a bedesman not saying the creed and the Lord's prayer. (b) It might be impossible to comply with this requisition by reason of the party's being dumb. Again, a party may be removed if he has the leprosy, which might be without any fault on his part. [MAULE, J. He would not be very fit company for the rest. TINDAL, C. J. The old writ, *de leproso amovendo*, (c) would have applied in such a case.]

There is another objection, that these parties are in receipt of alms. [HILDYARD. That objection was not taken before the revising barrister.] It is nevertheless open to the appellant to show that the very estate claimed would operate as a disqualification under the 2 W. 4, c. 45, s. 36. (d) It

(a) Anté, p. 40.

(b) The holding by the service of saying *pater-nosters* for the king's soul, was not unusual; and by reason of the dignity of the service, it was a tenure in grand serjeanty. *Serviens ad legem*, 293.

(c) See F N. B. 234.

(d) That section relates to cities and boroughs only.

would be strange that the very fact that disqualifies should confer right of voting. [MAULE, J. It may be said to be equally strange that the very estate that qualifies should act as a disqualification. Besides, there is nothing in the case to show any receipt of alms within twelve calendar months. ERLE, J. Was there ever a case in which an estate for life in *64] lands was *considered to be alms? TINDAL, C. J. There appear to have been three distinct objections taken before the revising barrister, and none of them raise this point.]

Hildyard, for the respondent. The 35 Eliz. c. 7 (the act referred to in the 39 Eliz. c. 5) enacts, by sect. 27, "that it shall be lawful for every person, for and during the space of twenty years next ensuing, to make feoffments, grants, or other assurances, or by last will in writing to give and bequeath, in fee-simple, as well to the use of the poor, as for the provision, sustentation, or maintenance of any houses of correction or abiding-houses, or of any stocks or stores, all or any part of such of his lands, tenements, and hereditaments, and in such manner and form as he might have done to and for the provision, sustentation, or maintenance of any houses of correction or abiding-houses, or of any stocks or stores, by force of the said statute." (a) The question before the revising barrister was, whether Lord Burleigh, in founding this hospital, proceeded, under the first statute, by way of feoffment, or whether the hospital was incorporated under the second statute. The barrister decided in favour of the former view of the case. But that was merely an inference of fact as to the effect of the evidence; which is a matter in respect of which there can be no appeal. He was then stopped by the court.

TINDAL, C. J. It appears to me that the only question open to us in this case is, whether the revising barrister was wrong in law, in presuming a legal commencement to the estate in these bedesmen. I think his decision was right, and that the facts fairly warranted him to presume,—which was all that was necessary,—that the estate existed by virtue of the queen's license before the passing of the 39 Eliz. c. 5.

*65] *COLTMAN, J., concurred.

MAULE, J. I am of the same opinion. The ordinances of 1597 were made, it appears, before the 39 Eliz. c. 5. In these ordinances "the feoffees" are mentioned. We may fairly presume that the hospital was endowed by a license from the Crown. Lord Burleigh, it is to be observed, would not have had much difficulty in getting such a license. The only question in the case is, whether these bedesmen have an equitable estate. (b) I think they have; as they are not liable to arbitrary amotion. (c)

(a) 18 Eliz. c. 20.

(b) The legal estate would be in the grantees of the rent charge of 100*l.* per annum, called in the ordinances "feoffees," the term "feoffees" or "feoffees sur confidence," being that by which trustees were, at that period, usually designated, whether their seisin was derived from a feoffment or from a grant.

(c) Upon the question, whether the existence of an arbitrary power determining the interest

ERLE, J., concurred.

Hildyard applied for costs.

MAULE, J. I think it is a case for costs, upon the ground that the successful party ought always to have his costs, unless there be some particular reason to prevent it.

TINDAL, C. J. It seems to me that this was a reasonable case for argument, and therefore that costs ought not to be given.

COLTMAN, and ERLE, Js., concurred.

Decision affirmed, without costs.

will derogate from the freehold character of such interest as a *legal* life estate, see *M. 20 E. 4*, fo. 9, pl. 4, *M. 14 H. 8*, fo. 14; *Co. Litt. 42 a*.

As to *equitable* interests, vide *antè*, 47, 48.

*BOROUGH OF BURY ST. EDMUNDS.

[*66

GEORGE NUNN, Appellant; and WILLIAM DENTON, Respondent.
Nov. 21.

A building, the lower part of which is used as a cow-house and stable, and the upper part, consisting of a chamber, used as a dwelling-place, is properly described as a *house*, within the 2 *W. 4*, c. 45, s. 27.

The court refused to allow an objection to be argued which had not been raised before the revising barrister.

Semble, that the revising barrister has power to amend a notice of claim.(a)

CASE. The respondent's name appeared in the list of persons entitled to vote in the election of members for the borough of Bury, in respect of the occupation of property in the parish of St. Mary, as follows:—

| Christian Name and Surname. | Place of Abode. | Nature of Qualification. | Name of Street, &c. where situate. |
|-----------------------------|-----------------|--------------------------|------------------------------------|
| William Denton. | Rushbrooke. | Building and land. | Haberden. |

The respondent also duly *claimed* to be inserted in the said list, in respect of the occupation of the same property, as follows:—

| Christian Name and Surname. | Place of Abode. | Nature of Qualification. | Name of Street, &c. where situate. |
|-----------------------------|-----------------|--------------------------|------------------------------------|
| William Denton. | Rushbrooke. | House and land. | Haberden. |

The respondent, who was duly objected to in both cases by the appellant, appeared in support of his claim to be retained, or to be inserted, in the said list.

At Michaelmas, 1838, the respondent and John Frederick Denton, Henry John Hasted, and John Thomas Ord, jointly hired a piece of pasture land in

(a) Vide *tamen*, 6 & 7 *Vict. c. 18*, s. 40.

*67] the said parish, for seven years, at a rent of 63*l.* per annum. *Shortly afterwards they erected a building on the said land at an expense of 45*l.*; the building was substantially built of brick and stone, with a tiled roof. The lower part consisted of a cow-house and stable; over the stable was a chamber about twelve feet square, in which were a fireplace and window. There was a staircase from the stable to the chamber; and the only entrance to the building was by folding doors, opening into the cow-house. The chamber was furnished with a bed and chairs by the respondent and his co-lessees. The pasture was used for taking in the cattle of persons in the neighbourhood to agist, at a certain price per head per week. Some cattle belonging to the respondent were also agisted there. When the parties hired the land, they employed a person named Clarke to collect the money paid for agistment; and it was arranged between them that Clarke should find some person to reside in the building in question to keep the keys of the gate of the pasture, and look after the cattle, he, Clarke, residing too far off to do so himself. Clarke accordingly put his brother-in-law, Betts, into the building; he maintained Betts, but paid him no wages. Betts resided and slept in the chamber in the building, kept the key of the gate of the pasture, looked after the cattle, and occasionally received the agistment money. The lower part of the building was sometimes used by the cattle when ill; the cows were occasionally milked there; and the respondent and some of his co-lessees put their horses in the stable. Each of the four lessees had a key to the doors of the building. The building was suitable for the purposes for which it was used; it was conveniently placed for the occupation of the pasture; and it was necessary that some person should reside on, or near to the gate of, the pasture, to look after the cattle, and to prevent the owners from taking them away without paying

*68] for the agistment. *The building continued in the same state until December, 1843, when part of the stable was converted into a room having a fireplace, with a door opening into the pasture; and Betts continued to reside in the building, and the pasture was occupied, as before.

The respondent was duly qualified to vote for the said borough, subject to the questions hereinafter mentioned.

I expunged his name from the list of voters, in respect of the qualification "*Building and land*," on the ground that the building was a house, and should have been so described. And I inserted his name in respect of his qualification "*House and land*," as claimed by him.

If the court are of opinion that the said building and land were not occupied by the respondent and his co-lessees, within the twenty-seventh section of the 2 W. 4, c. 45, the register is to be amended by expunging the name of the respondent therefrom. If the court are of opinion that the building and land were occupied by the respondent and his co-lessees, and that his qualification was properly described as "*building and land*," the register is to be amended by expunging the name of the respondent in respect of the qualification "*house and land*," and inserting his name as it originall

stood on the list in respect of the qualification "building and land." If the court are of opinion that the building and land were occupied by the respondent and his co-lessees, and that his qualification was properly described in his claim as "house and land," the register is not to be amended.

The cases of Hasted and Ord were consolidated with the principal case.

(Signed) C. E., revising barrister.

Manning, Serjt., for the appellant. Three questions have been submitted by the revising barrister for the opinion of the court; but he had no authority to submit any particular questions. The only question with which the court has to deal is, whether the building mentioned in the case is to be considered as a "building," within the meaning of the twenty-seventh section of the reform act, or whether it did not cease to exist as a building in December, 1843, and then become a "house." Under that section a party is required to occupy a house, or some building other than a house, for twelve months. The clause as to successive occupations, 2 Will 4, c. 45, s. 28, does not apply to this case; nor is there, indeed, any statement or claim in respect of successive occupation. The court has decided that a substantial agricultural erection, held with land, is sufficient to confer the franchise; (a) but that was because it came within the term "building;" it was not considered to be a "house." [MAULE, J. Are we not bound to presume, in favour of the decision, that every thing existed which should induce the revising barrister to hold, as he has done, that the building in question was a *house*? Why should not a house consist of a chamber, and a cow-house under it? TINDAL, C. J. Was it not a house, if a man was put in for the purpose of sleeping there?] There was no sufficient occupation to make it a house. The party put in was a mere agent to receive agistment money, not a domestic servant. [MAULE, J. Will not an occupation by a non-domestic servant be sufficient?] It is submitted that it will not. [ERLE, J. Are you not confounding *residence* with *occupation*? TINDAL, C. J. The occupation of the land was by agisting it; of the house, by putting a person in to receive the money. In the case of a mews or stable, with rooms above, the occupation of the servant would be that of the master. COLTMAN, J. If a man were put into a cottage as a *shepherd*, would not that be an occupation?] In the cases put, the master could not be rated as occupier. [*69 [*70

There remains another objection. The place of the voter's abode is entered in the notice of claim as Rushbrooke only, without stating where Rushbrooke is. [MAULE, J. Was that objection taken before the revising barrister?] It is not necessary that that should appear upon the case. All that the revising barrister is required by the forty-second section of the 6 Vict. c. 18, to do, is to "state in writing the facts which, according to his judgment, shall have been established by the evidence in that case, and which shall be material to the matter in question." He is not required to state what objections were taken before him. [ERLE, J. "The matter in

(a) See *Whitmore*, app., *Bedford*, resp. Antè, Vol. V. p. 9.

question " must mean the point upon which the decision appealed against proceeded. TINDAL, C. J. The revising barrister is also required to state in writing his decision upon the whole case, and also his decision upon the point of law in question, appealed against.] Under the sixtieth section, the court are bound to decide upon the whole case. [MAULE, J. That section says that the appeal cases shall be conducted according to the practice in special cases; and in those the points in dispute are always raised.] The section points out in what manner the court are to hear and to decide, not how the case is to be stated. [COLTMAN, J. If the point had been raised before the revising barrister, he might have altered the list.] He could not have altered the *notice of claim*. Upon the face of the case itself, it appears there is an insufficient description of the place of abode, not merely in the overseers' list, but in the notice of claim. The revising barrister had power to amend the description in the list. But the respondent could not avail himself of the list, inasmuch as if the building was, in point of law, a house, *71] the notice of the qualification was misdescribed therein. But the *revising barrister has no power under the 6 & 7 Vict. c. 18, s. 40, to make the slightest alteration in a notice of claim. In the form given of the list of county voters in the reform act, schedule (H), No. 3, the instances given of places of abode are as follow:—"Cheapside, London.—Long Lane, in this parish.—Market Street, Lancaster.—Church Street, in this parish."—In this case Rushbrooke is not even stated to be in England. [MAULE, J. It is not even stated to be in Europe.]

Byles, Serjt., for the respondents, was not called upon.

TINDAL, C. J. I do not think it is open to the appellant to insist upon the latter objection.(a) There might have been evidence upon the subject given at the time, before the revising barrister.(b)

As to the other point, I think that within the fair meaning of the act, this building was a *house*, where a party dwelt, as people usually dwell in a house, by sleeping there at night. The fact of cattle being placed in the lower part of the building, will not make it less a house. It is a very clear case.

The other judges concurred.

Decision affirmed, with costs.

(a) See the last case.

(b) The object of such evidence would be, to supply the revising barrister with materials for altering the terms of the notice of claim. The effect of such an alteration would be, to make the party appear to have made a claim, which, in point of fact, he never did make. No such power is expressly given by the 6 & 7 Vict. c. 18, s. 40, or by s. 75.

*CITY OF LICHFIELD.

[*72]

MOSS, Appellant; Overseers of ST. MICHAEL, LICHFIELD, Respondents. Nov. 21.

A. occupied jointly with B. In the poor-rate B. alone was assessed as occupier. A. *bonâ fide* paid the rates with his own hand, but without being called upon.
Held, that A. was not rated, and that the omission of his name was not cured by the 6 & 7 Vict. c. 18, s. 75.

CASE. John Brown Moss claimed to have his name inserted in the first list of voters for the parish of St. Michael, in the city of Lichfield. I rejected the claim, subject to the opinion of the court on the following case :—

John Brown Moss claimed as occupier of a building and land situate at Glass Croft, in the said parish. In support of his claim it was proved that the claimant occupied, jointly with his father, William Moss, a building, together with land, of a nature to confer the franchise, within the provisions of the twenty-seventh section of statute 2 W. 4, c. 45, and that the claimant and the said William Moss had occupied the same jointly for more than twelve calendar months next before the last day of July, 1844, as tenants thereof, under the same landlord, at the annual rent of 40*l.* and upwards, and that both the claimant and the said William Moss would be entitled to have their names inserted in respect of their occupation of the building and land, provided both of them were duly rated, in respect of the same, to all rates for the relief of the poor in the said parish, made during the time of their joint occupation as aforesaid.

Three rates were made for the relief of the poor of the said parish during the said period; in the first and second of which, the name of the said William Moss alone, was inserted as the person rated in respect of the *said premises, and the name of the claimant was wholly omitted from both of the last-mentioned rates, in respect of the said premises; but in the third rate, the claimant was rated, and his name, jointly with the name of the said William Moss, was inserted in the last-mentioned rate in respect of the said premises. The claimant, being the person liable to be rated for the said premises jointly with his father, the said William Moss, had, *bonâ fide*, paid, with his own hand, to the collector, the two first-mentioned rates, and all sums of money due for rates in respect of such premises during their joint occupation aforesaid; but the overseers of the said parish were not aware, until the beginning of May, 1844, and after such payment by the claimant of the first and second rates, that the claimant did occupy the said premises jointly with his father, the said William Moss. [*73]

It was contended, that by virtue of the seventy-fifth section of stat. 6 & 7 Vict. c. 18, the claimant ought to be considered as having been rated, and as having paid all rates, in respect of the said premises, within the meaning of the twenty-seventh section of stat. 2 W. 4, c. 45, and that he was en-

titled to have his name inserted in the said list, in respect of the premises aforesaid. I was of opinion that the omission of the name of the claimant, under the above circumstances, did not constitute a misnomer, or inaccurate or insufficient description in the said rate, of the person occupying the said premises, within the meaning of the 6 & 7 Vict. c. 18, s. 75, and that the claim had not been made out.

(Signed) T. B., revising barrister.

Byles, Serjt., for the appellant. The twenty-seventh section of the 2 W. 4, c. 45, requires, that, to be entitled to vote, the party shall have been rated in respect of the premises to all rates for the relief of the poor in the *74] parish, made during the time of the occupation *required, and have paid all the poor-rates by a certain time. This enactment would appear to require an *actual* rating; but it is submitted that the provisions of the seventy-fifth section of the 6 & 7 Vict. c. 18, apply to this case. It is thereby enacted, "that where any person shall have occupied such premises as in the said recited act are mentioned, for twelve calendar months next previous to the last day of July in any year, and such person, being the person liable to be rated for such premises, shall have been, *bonâ fide*, called upon to pay, in respect of such premises, all rates made for the relief of the poor in such parish or township, during the time of such his occupation, so required as aforesaid, and such person shall have *bonâ fide* paid, on or before the 20th day of July, in such year, all sums of money which he shall have been called upon to pay as rates in respect of such premises for one year previously (previous) to the month of April then next preceding, such person shall be considered as having been rated, any misnomer, or inaccurate or insufficient description in the rate, of the person so occupying, or of the premises occupied notwithstanding." The claimant here occupied jointly with his father; and though his name was omitted, he was liable to be rated, and he actually did pay the rates with his own hand. [MAULE, J. Can it be said that he was *bonâ fide* called upon to pay the rates?] This being a joint occupation is like a partnership; and if the partners were rated by the name of the firm, each party would be liable to pay, and if one were called upon to pay, and did pay, such payment would enure to the benefit of all the partners. The words in the sixty-sixth section of the new poor-law amendment act, 4 & 5 W. 4, c. 76, are very similar to those of the registration act; and in *Regina v. The Inhabitants of Hulme*, 4 Q. B. 538, where the pauper occupied a tenement, and paid the *75] rent and *poor-rate for a year; and in the rate, the landlord's name was inserted under the head "name of owner," but in the column headed "name of occupier" no name was entered; it was held, that the pauper was sufficiently assessed to satisfy the statute. [MAULE, J. In such cases the assessment is upon the property. TINDAL, C. J. And whoever may be the occupier is charged. ERLE, J. Where a firm is rated, all the partners comprising the firm are included in the rate; but

here, somebody else is the party assessed.] The claimant was bound to contribute to the rate paid by his co-tenant.

Kinglake, Serjt., *contrà*, was not called upon.

TINDAL, C. J. It does not appear to me that this case falls within the provisions of the seventy-fifth section of the 6 & 7 Vict. c. 18. That section applies only to cases of inaccurate or insufficient description in the rate. And even in those cases, the party must have been *bonâ fide* called upon to pay, and have *bonâ fide* paid, the rate. The appellant in this case was not *called upon* to pay. The decision must be affirmed; but as it is a case of some difficulty, I think it must be without costs.

COLTMAN, J. The appellant was neither rated in fact, nor called upon to pay the rate.

MAULE, J. This case is certainly not within the 2 W. 4, c. 45, s. 27. And the 6 & 7 Vict. c. 18, s. 75, applies only to misdescriptions in the rate. The appellant was not rated in any way.

ERLE, J. The real question is, whether the party was intended to be rated. In *Regina v. Hulme*, it was intended to rate the occupier, although a blank was left in the column in which his name should have been inserted.

Decision affirmed without costs.

*HILARY TERM.

[*76

SOUTHERN DIVISION OF LANCASHIRE.

WILLIAM ECKERSLEY, Appellant; JOHN BARKER, Respondent.
Jan. 16.

The name of the property in respect of which a right to a county vote is claimed, or the name of the occupying tenant, is only required to be inserted in a notice of claim, and in the list of county voters published by the overseers, where the house is not situate in a street, lane, or other like place.

CASE. The respondent's name appeared on the list of voters in respect of property, situate in the township of Chadderton, in the polling district of Oldham, in the Southern division of Lancashire, and was objected to by the appellant. No exception was taken to the notice of objection, the service of which was admitted.

The particulars of the respondent's name and surname,—place of abode,—nature of qualification,—and situation and description of the qualifying property appeared on the list of voters, as follows :—

| Christian name and surname of each voter at full length. | Place of abode. | Nature of Qualification. | Street, lane, or other like place, in this parish or township, and number of house (if any), where the property is situate, or name of the property (if known by any), or name of the occupying tenant; or, if the qualification consist of a rent-charge, then the names of the owners (a) of the property out of which such rent-charge is issuing, or some of them, and the situation of the property. |
|--|-------------------------|--|---|
| Barker, John. | Seedey Bank, Pendleton. | Undivided moiety of two freehold cottages. | Tinker Lane, Hollinwood. |

The respondent is seised, in fee-simple, of an undivided moiety of two cottages, situate in Tinker Lane, Hollinwood, in the township of Chadderton.

*77] A part of the *township of Chadderton is commonly called and well known by the name of Hollinwood. Part of the public turnpike road from Oldham to Manchester passes along Tinker Lane. All on one side of the lane, and the whole of the lane, at one end thereof, is within Hollinwood, in the township of Chadderton; the other part of the said lane being within the township of Oldham. The division between the two townships is well and commonly known. There are from forty to fifty cottages standing along Tinker Lane, and occupying, with the intervals between them, a line of from 200 to 250 yards in length. About ten of the cottages are in the township of Oldham; all the other cottages are in the township of Chadderton. None of the cottages in Tinker Lane are numbered, nor are the two cottages, in respect of which the respondent founded his qualification as before mentioned, nor is either of them, known by any name of the property. Any person inquiring in Tinker Lane, or in the neighbourhood, for the respondent's cottages, would readily find the cottages described in the said list of voters.

It was objected on behalf of the appellant, that "Tinker Lane, Hollinwood," was not a sufficient description of the situation of the qualifying property within the statute 6 & 7 Vict. c. 18, reference being also had to the forms in schedule (A.) appended to the said statute; and that neither of the cottages being numbered, and the property not being known by any name, the names of the occupying tenants ought to have been given. I thought that "The name of the property, if known by any," and "The name of the occupying tenant," were not intended as *substitutes* for the number of a house in any "street, lane, or other like place," (by "other like place," understanding square, court, crescent, yard, alley, and the like,) but that they are separate and distinct heads of description of themselves, *78] *intended to apply to properties (very numerous in county qualifications) which are not situate in any "street or other like place," and

(a) So in No. 3; but in No. 5 the *occupying tenant* and not the owner is mentioned.

not to properties which are so situate ; and that if all the above descriptions are to be referred to properties situate in some " street, lane, or other like place," then, the numerous properties giving county qualifications to vote, and which are not so situate, as country mansions, farms, manufacturing and other works, and the like, will be left undescribed. I decided that the description given of the respondent's qualification was sufficient ; and that, under the circumstances, it was not necessary to insert the names of the occupying tenants or either of them ; but I offered to do so if the respondent wished it. The respondent declined to have the names of the occupying tenants, or of either of them, inserted, on the ground that in consequence of the frequent changing of tenants in small tenements of this kind, the insertion of the occupying tenants' names would probably render the description of his qualifying property less certain than if their names had been omitted. I retained the respondent's name on the list, without adding any tenant's name. Each of the cottages had an occupying tenant.

The question for the opinion of the court is, whether the name of the respondent was rightly retained on the list of voters, without inserting the names of the occupying tenants or the name of one of them.

If the court are of that opinion, the *list* (a) is to stand without amendment ; but, if the court are of a contrary opinion, then the *list* (a) is to be amended by expunging the name of the respondent therefrom.

(Signed)

R. M., revising barrister.

The case was argued in last Michaelmas term. (b)

**Cockburn*, for the appellant. The overseers are required by the [79
6 & 7 Vict. c. 18, s. 4, to publish a notice annually, requiring county voters to send in their claims ; and they are required to publish this notice according to the form given in schedule (A), No. 2. In that form the heading of the fourth column is, " street, lane, or other like place, in this parish, &c., and number of house, (if any,) where the property is situate, or name of the property, if known by any, or name of the occupying tenant," &c. By sect. 5 the overseers are to prepare and publish a list of claimants, according to the form numbered (3) in schedule (A). In that form the heading of the corresponding column is as follows, " Street, lane, or other like place, &c., and number of house, (if any,) where the property is situate, or name of the property *and* the name of the tenant," &c. ; the word *and* being in this place substituted for *or*. The form of the "list of persons objected to, to be published by the overseers," given in schedule (A), No. 6, also runs thus, " street, &c., &c., or name of the property, *and* the name of the tenant," &c. It appears from these two last forms that the name of the occupying tenant was intended to be inserted in every case. At all events, the insertion of the name of the tenant is not to be contingent upon any insufficiency of description of the premises. If the house be situated in a street or lane, and has a number, the number must be stated,

(a) Or rather the *register* formed therefrom.

(b) Before Tindal, C. J., Coltman, Maule, and Erle, Ja.

and that may be sufficient; but if it have no number, then the name of the tenant is requisite. The act clearly intended that the fullest description of the premises should be given. It may possibly have been meant that *all* the particulars mentioned should be stated. At any rate, it is obvious that one of the three courses pointed out must be adopted; but here there is no compliance with any of them. [COLTMAN, J. The case does not set forth the *80] claim sent in by the party; it may be that the name *of the tenant was stated therein, and that the overseers have neglected their duty in not inserting it in the list.] The court will presume that they have performed their duty. The reason stated by the revising barrister for his decision, that the house could be found by the present description, is not sufficient to warrant a departure from the form prescribed by the act, for the purpose of identifying the property. In the corresponding forms given in the reform act, schedule (H), Nos. 2 and 3, what it required to be stated is the "name of the property, *or* name of the tenant;" but the word *or* appears to have been intentionally altered to *and* in the registration act.

Cardwell, for the respondent. The form No. 2, in schedule (A) to the registration act, is a direction for the voter; the form No. 3 is for the overseers. The overseers are directed, by the fifth section, to adopt the statement of the voter, to whom an election is given as to which mode of describing his property he will adopt. No objection is made in this case, that the overseers have not followed the claim; and it must, therefore, be taken that they have done so. It appears, from the statement of the case, that the insertion of the names of the occupying tenants would have had a tendency to mislead; as the tenants are frequently changing. Here the party, in sending in his claim, has elected to use the first branch of the mode of description enumerated in the heading to the fourth column; he has inserted "the lane" where the house was situated. If a house were unoccupied, it would be impossible for a claimant to comply with the rule as contended for on the part of the appellant. [TINDAL, C. J. In that case he might describe the house as empty. MAULE, J. The question is, if what comes after the word "*or*" is intended to be a substitute for the *number of the* *81] *house*, that is, something to *point out the particular house.] If that were the correct construction, it would follow, that every property, in respect of which a party could be qualified, *must* be situated in a "street, lane, or other like place." [MAULE, J. If not so situated, the party would leave out that part of the description. The object appears to be that the particular property should be pointed out. ERLE, J. The fifth section requires that the list, to be made out by the overseers, shall be in the form No. 3, schedule (A), and goes on to say that "in every such list the Christian name and surname of every claimant, with the place of his abode, the nature of his qualification, and the local or other description of the property, *and* the name of the occupying tenant thereof, shall be written as the same are stated in the claim." The form No. 3 also says, "*and* the name of the tenant." But the form of the claim No. 2 says "*or*;" and the overseers

are required to give the particulars as "the same are stated in the claim." [COLTMAN, J. If, according to your argument, the claimant has the option to give either description, it will be sufficient if the name of the tenant be stated, though the house be situated in a street or lane. But such a description would not assist in identifying the premises.] The schedules of the reform act that have been referred to, are in favour of the view contended for on behalf of the respondent; and although the particulars in the schedules to the registration act are not so full, the schedules in both acts are to be construed in the same manner.

Cockburn, in reply. The whole machinery of registration introduced by the reform act has been repealed by the registration act, the forms in the schedules of which are much more stringent. By the forty-second section of the reform act, the revising barrister has power to make alterations in the list, where the name of "any person, or place of his abode, or nature of his qualification, "or the local or other description of his property, or the name of the tenant in the occupation thereof," shall be omitted. [82 A similar power is given by the fourth section of the registration act; but there the words are, "or the local or other description of the property of any person who shall be included in any such list, and the name of the occupying tenant thereof;" which corresponds with the difference in the schedules. The party is bound to give the best description he can. In London, or in any other large town, it would be absurd to describe a house merely as in the occupation of John Smith. In the case of a change of tenants, the party might send in a fresh claim. (a)

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court.

The objection in this case was, that the description, in the list of voters, of the property in respect of which the respondent claimed the right to vote, was insufficient, inasmuch as it omitted to state the names of the occupying tenants. The qualification is described to be in respect of "an undivided moiety of two freehold cottages in Tinker Lane, Hollinwood;" and it is stated as a fact in the case that none of the cottages in Tinker Lane are numbered, and that neither of the two cottages is known by any particular name.

The question therefore is, whether, under the circumstances of this case, the names of the occupying tenants are required to be inserted; [83 and we think, upon a proper construction of the act, that they are not.

The fourth section of the 6 Vict. c. 18, requires the notice of claim to be delivered, or sent, to the overseers, according to the form of notice set forth in schedule (A), and numbered 2, or to that effect; and the form

(a) Or, as is frequently done, he might have the entry corrected at the next revision. Few persons would be likely to be misled by reason of any intermediate change, inasmuch as it would be known that the name inserted had reference to the state of the tenancy at the time the notice of claim was sent in, or when the lists were last corrected.

No. 2 requires the "street, lane, or other like place, and number of the house (if any) where the property is situate, or name of the property, if known by any, or name of the occupying tenant," to be inserted; and we think the word "or," in this form, is disjunctive, and creates three different descriptions, and that it is sufficient if the qualification is brought within any one of them; namely, either the street, or lane, or number, if any, the name of the property, if any; or the name of the occupying tenant, if any. And although it is contended that the fifth section of the act requires the overseers to make out, according to the form numbered 3, in schedule (A), an alphabetical list of the claimants, containing (amongst other things) "the nature of his qualification, and the local or other description of his property, *and* the name of the occupying tenant thereof;" and that, consequently, the name of the occupying tenant must be inserted in each case, yet, it appears to be a sufficient answer, that this direction is qualified and restricted by the words which immediately follow, namely, "that the same shall be written as they are stated in the claim."

The direction at the head of the form No. 2 appears to us to intend, that if a house be in a street, lane, or other like place in the parish, the street or lane shall be mentioned; and that if the houses be numbered, the number also shall be given; but that if the house and premises be not in a street or lane, or other like place, but are in a road, or on a common, or the like, *84] then the name of the property shall be given, if known by any, or the name of the occupying tenant. If, however, the two latter requisites be held to apply necessarily to the house or premises where situated in a street or lane, then this inconvenience will follow, that there is no description required by the act to be given to a house or premises, not situated in a street or lane, or other such like place.

The direction given by the legislature to the overseers in the statute of 2 W. 4, c. 45, s. 37, for the framing of their notice according to the form No. 1, in schedule (H), annexed to that act—which is a notice precisely for the same object and purpose as that required by sect. 4, of the 6 & 7 Vict. c. 18—is so plainly expressed as to leave no possible doubt but that the requisition to give the name of the property, or the name of the occupying tenant, only holds where the house is not situate in a street, lane, or other like place; and as the statute 6 & 7 Vict. c. 18, is made in *pari materia* with the former act, it may be properly inferred that no more is required by the latter act than by the former.

We therefore think that the decision of the revising barrister,—that the description of the qualification of the respondent in the overseers' list was sufficient,—was a proper decision, and that the same must be affirmed.

Decision affirmed.

*CITY OF WESTMINSTER.

[*85]

SAMUEL PITTS, Appellant; and FRANCIS SMEDLEY, Esquire,
High Bailiff of WESTMINSTER, Respondent. Jan. 16.

The occupier of part of a house, where the landlord resides upon the premises, and retains the key of the outer door, is a mere lodger, and is not a person occupying "as owner or tenant."

Quere, whether a party can be registered for a borough in respect of a qualification described as the occupation of "part of a house."

Where a case sent by the revising barrister, found that a claimant "stated" certain matters, it was remitted upon the ground that it set forth *evidence* and not *facts*.

CASE. Parish of Saint Mary-le-Strand. Case of Samuel Pitts, a claimant.

Notice of Claim.

| | | | |
|---------------|---------------------------------|-------------------|---------------------------------|
| Samuel Pitts. | 17 Catharine Street, Strand. | Part of house. | 17 Catharine Street, Strand. |
|---------------|---------------------------------|-------------------|---------------------------------|

Charles Marshall is owner of a house and shop, No. 17 Catharine Street, Strand. He occupies the shop and first floor. He lets the other floors to several lodgers.

Samuel Pitts [states that he](a) rents the second and third floors at a weekly rent, amounting to 26*l.* a year; [that] he has exclusive control over these rooms, and has the keys thereof in his possession; [that] he has also a latch key to the street door, by which he lets himself in at night; [that] there are other lodgers in the house, to some of whom the landlord gives latch *keys; but he sometimes has young men as lodgers, and to these the landlord does not intrust latch keys; [that his](b) (these [*86 words were omitted in the amended case, and the words *the claimant's* inserted in lieu thereof,) right of egress and ingress has never been interfered with by the landlord.

[That] there is another lock to the entrance door, but he has never seen the key of it; [that] when he has found the street door fastened, he has entered the house through Marshall's shop.

Pitt's name appears with Marshall's upon the rate made in November 1843, and upon the subsequent rates. No rate was made between April, 1843, and November, 1843. Upon these facts, the point raised for my decision was, whether Samuel Pitts had such an exclusive occupation of the

(a) When this case was called on in last Michaelmas term the Lord Chief Justice observed that the case stated *evidence* only, and not *facts*; and that it should be referred to the revising barrister to state facts only; and also to state whether or not the landlord resided in the house. The case was accordingly remitted to the revising barrister, and was amended by striking out the words in brackets, and inserting those in italics, *infra*, p. 86.

(b) See note (a), *supra*.

second and third floors of the house No. 17 Catharine Street as to confer the franchise.

On that point I decided in the negative.

(Signed) D. C. M., revising barrister.

Charles Marshall, *the landlord, not only occupied the ground floor as a coffee shop, but also resided with his family on the premises.*

(Signed) D. C. M.

Cockburn, for the appellant, contended that the claimant occupied a "building" within the meaning of the twenty-seventh section of the reform act; upon the authority of *Wright*, appellant, and *The Town Clerk of Stockport*, respondent.^(a) In this case no one had a right to interfere with the occupation of the claimant. The only difference between this and the case cited, is, that here the landlord resided upon the premises. That fact did not appear in the *Stockport* case; but the landlord there must at least *87] have had a control over the *steam-engine. It might be that in cases of burglary, the whole of the house in the basement would be considered as in the occupation of the landlord; but the reform act is not to be construed by any strained analogy with the criminal law. If it be conceded that the occupation of a portion of an entire building is sufficient to confer the franchise, the fact of the landlord residing in another portion can make no difference. [ERLE, J. The claim in this case is in respect of "part of a house." In the *Stockport* case the premises occupied were considered to constitute "a building."] The case does not raise any objection to the form of the claim.

Merewether, for the respondent, was not called upon.

TINDAL, C. J. It appears to me that this case is free from all doubt. The question is, whether the claimant occupied any premises as "owner or tenant." It does not turn so much on the description of the premises as on the nature of the occupation. The landlord of the house gives only a limited enjoyment therein to the claimant. The door of the house has a lock to it, of which the claimant has not the key; his right of access therefore to the rooms in his occupation is merely permissive. It is not an occupation as owner or tenant. He is strictly an inmate or lodger.

The other judges concurred. Decision affirmed, with costs.^(b)

(a) *Antè*, Vol. V. p. 33.

(b) *Vide Score*, appellant; *Huggett*, respondent, post, p. 95: and *Wansey*, appellant; *Perkins*, respondent, (*Hill's case*), post, p. 151.

*88]

*BOROUGH OF TOTNES.

TOMS, Appellant; CUMING, Respondent. Jan. 16.

A notice of objection, and also the duplicate notice, where notice of objection is sent by the post, must be personally signed by the objector.

CASE. Henry Toms of Fore street, Totnes, on the list of voters for the parish of Totnes in the borough of Totnes, objected to the name of

Samuel Angel being retained on the list of persons entitled to vote in the election of members for the said borough.

The notice of objection had been signed by the objector himself, and a copy thereof had been signed with the name of the objector by one William Bernard Hannaford, by the direction of the objector, and in his presence, and both were addressed to Angel, at his place of abode, as described in the list. The notice and copy were examined by the objector, and were by him taken to the postmaster at Totnes on the 23d day of August last, and compared and stamped by the postmaster. The notice was retained at the post-office to be forwarded according to the act, and the copy was returned to the objector, who produced the same to me in court. The notice would, in the ordinary course of post, have been delivered at Angel's place of abode as described in the list, on or before the 25th day of August last. It was objected on the part of Angel, that the production of such stamped copy was not the production of a *duplicate* notice, as required by the 6 & 7 Vict. c. 18, s. 100. (a) And I being of that opinion, retained the name of the voter without proof of his qualification. (Twelve other cases were consolidated with the principal case.)

*The question for the opinion of the court is, whether the name of Samuel Angel was rightly retained on the list of voters. [89

If the court are of that opinion, the register is to stand without amendment.

If the court are of a contrary opinion, the register is to be amended by expunging therefrom the names of Samuel Angel and the other twelve. (b) (Signed) J. L. L., revising barrister.

Kinglake, Serjt., for the appellant. The stamped copy of the notice of objection, produced before the revising barrister, although not signed by the objector himself, was a *duplicate*, within the meaning of the 100th section of the 6 & 7 Vict. c. 18, s. 100, inasmuch as it was signed by his authority. The notice itself, sent by the post, was actually signed by him. [TINDAL, C. J. The notice sent by the post may be called an *original*; the question is, whether the other copy may be called a *duplicate*. CRESSWELL, J. Was it not the intention of the statute that the copy retained should be *identical* with the one that is sent?] The seventeenth section requires the notice of objection to be signed by the party objecting; that must mean the notice sent to the voter. It is sufficient if it be shown that the notice retained has been examined by the postmaster, and found to correspond with that which was sent. He would not know the handwriting of the party, of which the stamp is no authentication. It may be necessary to prove the signature of the objector to the notice that is sent by post; but more is not required. [MAULE, J. The seventeenth section does not say the signature must be in the objector's own handwriting. May he not sign by his agent? ERLE, J. Might not an attorney have *signed both notices?] Prior to the passing of the registration act, an objector must have proved personal service of the notice, and that such notice had

(a) Antè, Vol. V. p. 98.

(b) Vide post, p. 132, note (a).

been duly signed: that act has dispensed with the personal service, leaving the question as to the sufficiency of the signature untouched. The signature here is sufficient, upon the principle, *qui facit per alium, facit per se*. In *Schneider v. Norris*, 2 M. & S. 286, a bill of parcels, in which the name of the vendor was *printed*, and that of the vendee *written* by the vendor, was held to be a sufficient memorandum within the statute of frauds^(a) to charge the vendor. [TINDAL, C. J. That was under the seventeenth section of the statute, which requires the memorandum to be "signed by the parties to be charged, or their agents." In another section, (sect. 7,) the statute speaks of a signature "by the party," without mentioning any agent. CRESSWELL, J. In *Hyde v. Johnson*, 2 New Ca. 776, 3 Scott, 289, it was held that under the 9 G. 4, c. 14, s. 1, an acknowledgment, signed by the agent of the debtor, will not retrieve a debt barred by the statute of limitations; and that it must be signed by the debtor himself.] That case appears to be inconsistent with *Schneider v. Norris*.

Cockburn, for the respondent. There is no inconsistency between the two cases. *Schneider v. Norris* was decided upon the seventeenth section of the statute of frauds, in which the signature by an agent is mentioned. *Hyde v. Johnson* turned upon the 9 G. 4, c. 14, which requires the acknowledgment to be signed "by the party chargeable thereby," nothing being said about an agent. The document produced before the revising barrister in this case was a *copy*, and not a *duplicate*. [MAULE, J. It appears *91] that the postmaster may select *which of the two documents he will send. A duplicate means a document which is the same as another in all essential particulars.] (b) There is no provision in the reform act that the objector shall sign the notice of objection. (c) Though the form of the notice, given in the schedules, ends by saying "(Signed) A. B. [*place of abode*]," doubts may have arisen as to what was a sufficient signature under that schedule, and the new act shows the intention to have been that the notice should be actually signed by the person objecting.

Kinglake, Serjt., in reply. In *Kine v. Beaumont*, 3 Bro. & B. 288, 7 J. B. Moore, 112, it was held that the copy of an original letter giving notice of the dishonour of a bill, is admissible in evidence without notice to produce the original letter; upon the ground, as stated by BURROUGH, J., that there is no substantial distinction between a duplicate original and a copy made at the time. [MAULE, J. It would hardly be contended upon the authority of that case, that an examined copy of a bill of exchange drawn in duplicate, was the same thing as a duplicate.] (d) If the signature of the party is

(a) 29 Car. 2, c. 3.

(b) In the case of an indenture, the distinction is between *counterparts* executed by the several parties respectively, each party affixing his or their seal to only one counterpart,—and *duplicate originals*, each executed by all the parties. Vide *antè*, Vol. II. p. 518, (b).

(c) See 2 W. 4, c. 45, s. 47.

(d) Bills of exchange drawn in sets are not usually called duplicates, or bills drawn in duplicate; nor does either term seem to be strictly applicable; bills so drawn appearing rather to be in the nature of distinct *alternative mandates*.

essential to the original notice, then the document in question was not the same in all essential particulars.] In *Hyde v. Johnson* great stress is laid upon the fact—that an agent was mentioned in the original statute of limitations, 21 Jac. 1, c. 16, but was not mentioned in Lord TENTERDEN's act, 9 G. 4, c. 14, which was a rider to the former statute. That *argu- [*92
ment does not apply to the present case. It is only necessary to prove the personal signature of the objector to the original notice which is sent to the party objected to. [ERLE, J. Is not the production of the stamped copy sufficient for that purpose?] That is only to show that a notice has been sent; whether the notice is sufficient, is another question.

TINDAL, C. J. It appears to me that the revising barrister was right in his decision, that the notice of objection was not proved to have been given pursuant to the provisions of the 100th section of the 6 & 7 Vict. c. 18. The first question is, whether the original notice of objection should be signed by the objector himself. The seventeenth section of the act says, that "Every person, so objecting, shall give, or cause to be left at the place of abode of the person objected to, a notice according to the form numbered (11) in the said schedule (B); and every notice of objection shall be signed by the person objecting." And the form given in that schedule commences with the words, "I hereby give you notice," &c., and concludes, "(Signed) A. B., of, [place of abode], on the list of voters for the parish of —."

The natural meaning of these words is, that there shall be a *personal* signature. And there is great reason and good sense in such an enactment. If the objector were unknown, and was at liberty to get some one else to sign the notice, there might be great difficulty in obtaining costs from him. Some shuffling person might be put forward in his stead; and great inconvenience and vexation might be the result. The case of *Hyde v. Johnson* corroborates the propriety of this interpretation of the clause in question.

Then, if the original notice must be signed by the objector himself, it appears to me that the requisites of the 100th section have not been complied with. That *section requires that "whenever any person shall [*93
be desirous of sending any such notice of objection by the post, he shall deliver the same, duly directed, open, and in duplicate, to the postmaster," &c.; thus, apparently, treating each document as an original. Then the postmaster is to "compare the said notice and the duplicate, and on being satisfied that they are alike in their address and in their contents, shall forward one of them to its address by the post, and shall return the other to the party bringing the same, duly stamped with the stamp of the said post-office." It is open, therefore, to the postmaster to send which notice he pleases. The very meaning of the term *duplicate* is, that one document resembles the other in all essentials. The instance put by my brother MAULE, in the course of the argument, of bills drawn in duplicate, (a)

(a) Vide *supra*, 91, (c).

is an apt illustration. In this case, one of the documents was a notice ; but the other was no notice at all.

MAULE, J. I am of the same opinion. I think that the signature should be that of the party objecting ; and that this is deducible both from the words of the seventeenth section and from the form given in the schedule there referred to. The form shows that the name and place of abode of the objector are to be at the bottom of the notice ; and the provision at the end of the section, requiring every notice to be signed by the person objecting, is in addition to the requisition that his name shall be at the foot of the notice. This shows that it is the party himself who is to put his name there. The term *signing* means marking, in some way, by the party himself. Two things, therefore, appear clearly to be required—that the *94] name of the objector be at the bottom of the notice—and that *it be placed there by the party himself. The purport of the section is, that the party objected to may have some means of knowing that the objecting party did really object. Otherwise persons might be called upon to come up and defend their votes, and, after all, might find out that there was no real objector, but that the name of the supposed objector had been put to the notice without his authority.

The next question is, whether the duplicate, which is to be returned by the postmaster to the person who brings the notice, must be similarly signed. The term “duplicate” means a document which is essentially the same as some other instrument. It is a very different thing from an examined copy ; although an examined copy may, in effect, be a duplicate under certain circumstances. But, in the present case, the copy is essentially different from the original.

I conceive that it was necessary to prove before the revising barrister the handwriting of the objector to both of the documents ; and, such proof not having been given, that the barrister was right in his decision.

CRESSWELL, J. I am of the same opinion. The effect of the seventeenth section is, that the objecting party is to give a notice of objection, and that his name is to be subscribed thereto by himself. As to the duplicate, the objector is relieved from the proof of the ordinary service of the notice, by adopting the course prescribed by the 100th section ; but he must show that the document sent by the post is identical with the one produced before the barrister.

ERLE, J. I am of the same opinion. The provisions of the statute seem to be framed with particular care that a notice of objection shall be signed *95] by the objector *himself. This is apparent from the terms both of the seventh, and also of the seventeenth section. The 100th section speaks of a duplicate notice, which can only mean a duplicate original.

Decision affirmed.

CITY OF WESTMINSTER.

CHARLES SCORE, Appellant; and GEORGE HUGGETT, Respondent. Jan. 16.

The occupier of part of a house, who has a key of the outer door, the landlord not residing in or occupying any portion of the premises, is entitled to vote.

Seemle, (per Maule, J.,) that "apartments" is a proper description of the premises so occupied.

CASE. Parish of St. James. Case of George Bedford, a claimant.
Notice of claim.

| | | | |
|-----------------|---------------------------------------|-------------|---------------------------------------|
| George Bedford. | 7 Leicester Street, Regent Street. | Apartments. | 7 Leicester Street, Regent Street. |
|-----------------|---------------------------------------|-------------|---------------------------------------|

George Bedford occupied apartments at No. 7 Leicester Street in this parish, consisting of two rooms on the second floor, which communicated with each other, for which he paid 20*l.* 16*s.* a year rent. These rooms were occupied for four years by Bedford for the purpose of dwelling; and Bedford had the use of the back kitchen and yard, in common with other parties. The house consisted of four stories; the front kitchen on the basement was let to another party. The ground floor, first floor, and attics were each separately occupied by other parties. The access to the kitchen, and to the first, and other floors, was by the common street door of the house, a key of which was in the possession of each of the occupiers, who had, each, a key of the respective apartments in his own occupation, [*96 and the exclusive right of access thereto.

The landlord, Mr. Kemp, did not reside in, or occupy any part of, the house. No question arose as to residence or rating.

Upon these facts, the point raised for my decision was, whether the occupation of such two rooms in No. 7 Leicester Street by the claimant, was sufficient to confer the elective franchise.

And upon that point, I decided in the affirmative.

(Signed) D. C. M., revising barrister.

Merewether, for the appellant, took a preliminary objection, that the party claimed in respect of the occupation of "apartments," which he submitted was an insufficient description of the property. [CRESSWELL, J. The case raises no objection upon that point.(a) MAULE, J. *Apartments* appear to me to be a sufficient description. ERLE, J. We cannot enter upon a point not raised by the case.(a)]

The cases that have been decided as to burglary, or under the poor laws, have no application to the present question. *Wright*, appellant, and *The Town-clerk of Stockport*, respondent, ante, Vol. V. p. 33, is very distinguishable from this case. There, although the landlord may have occupied one room, still the other parties had a separate and dis-

(a) Vide *Simpson*, appellant; *Wilkinson*, respondent, supra, p. 50.

tinct occupation of the other parts of the building; but in this case, if the landlord came into the house, it would alter the situation of the claimant. [MAULE, J. So it would if the landlord turned him out.] This case resembles that of *Pitts*, appellants, and *Smedley*, respondent, ante, p. 85.

*97] **Cockburn*, for the respondent, was not called upon.

TINDAL, C. J. In this case the claimant had the key of the outer door. The case, I think, cannot be distinguished from one where two families occupy one house—the one family living in rooms on one side of the staircase, and the other family on the other side.

The other judges concurring,

Decision affirmed, with costs.

BOROUGH OF CAMBRIDGE.

CHARLES HENRY COOPER, Appellant; and CHARLES PESTELL
HARRIS, Respondent. Jan. 16.

(AUSTIN'S CASE.)(a)

A letter-carrier to a post-office, who has resigned his situation within twelve months before the 31st of July, being disqualified from voting until after twelve months from the resignation of such situation, by the 22 G. 3, c. 41, s. 1, is not entitled to be registered.

The court will require the case of the appellant to be argued, if he appears, though no one appears for the respondent.

CASE. Charles Henry Cooper objected to the name of Samuel Austin being retained on the list of voters for the parish of the Holy Trinity.

The name stood thus upon the list:

| Name. | Place of Abode. | Qualification. | Street, Lane, or other place in this Parish, where property is situate, and number of House, if any. |
|-----------------|-----------------|----------------|--|
| Austin, Samuel. | King Street. | House. | King Street. |

*98] *Samuel Austin was, in the month of November, 1843, appointed by the postmaster-general to carry letters from Cambridge to Water-beach, and to receive the postage due upon the letters so carried. Austin made the declaration set out in the schedule annexed to the statute 1 Vict. c. 33; he was employed in the business above mentioned for above three months, and resigned his office in March, 1844.

It was contended that, by virtue of several statutes, and especially of the

(a) There was another case in the paper, between the same appellant and respondent; and the Lord Chief Justice intimated, in a similar case, that under such circumstances it would be advisable to designate each case in some manner, such as by adding the name of the claimant or party objected to.

22 Geo. 3, c. 41, (a) and the 6 & 7 Vict. c. 18, s. 40, (b) the name ought to be expunged from the list of voters.

I decided otherwise, and retained the same.

(Signed)

M. P., revising barrister.

Gunning, for the appellant, inasmuch as no one appeared for the respondent, prayed the judgment of the court, to which he submitted he was entitled, as the appeals from the revising barristers were, by the sixtieth section of the registration act, directed to be heard in the same manner as special cases between party and party. [CRESSWELL, J. That section refers only to the "course of the argument." TINDAL, C. J. It is possible that [1899 the respondent may think the ground of appeal so weak that it is not necessary for him to appear in support of the decision. We must hear the appellant.]

It is clear that the case of the party objected to falls within the disqualifying words of the 22 G. 3, c. 41, s. 1. He was disqualified for twelve months after he resigned his office; and, therefore, the barrister was bound to expunge his name, under the 6 & 7 Vict. c. 18, s. 40. It may be a hard case; but is not more so than that of a person coming of age, or a freeman acquiring his freedom on the 1st of August, neither of whom would be entitled to be registered on the 31st of July.

TINDAL, C. J. We all agree that the decision is wrong.

Decision reversed.

(a) By sect. 1, "no postmaster, postmaster-general, or his or their deputy or deputies, or any person employed by or under him or them in receiving, collecting, or managing the revenue of the post-office, or any part thereof, &c., &c., (enumerating other parties,) shall be capable of giving his vote for the election of any knight of the shire, commissioner, citizen, Burgess, &c.: and if any person hereby made incapable of voting as aforesaid, shall, nevertheless, presume to give his vote during the time he shall hold, or within twelve calendar months after he shall cease to hold or execute, any of the offices aforesaid, contrary to the true intent and meaning of this act, such vote so given shall be held null and void, to all intents and purposes whatsoever, and every person so offending shall forfeit the sum of 100*l*."

(b) *Anté*, Vol. V. p. 86, note (b).

BOROUGH OF NORTHAMPTON.

JOHN JEFFREY, Appellant; and WILLIAM KITCHENER, Respondent. Jan. 20.

Held, that a qualification to vote in a borough election as an inhabitant householder, is not preserved by the reform act, unless it has been retained continuously from the passing of that act.

CASE. John Jeffrey duly objected to the name of William Kitchener, which appeared—on the list of persons (not being freemen) entitled to vote for the said borough, in respect of any right other than those conferred by the 2 W. 4, c. 45, for the parish of All Saints—in the borough of Northampton, as follows:—

| | | | |
|---------------------|-----------------|-------------------------------------|-----------------|
| Kitchener, William. | Gregory Street. | Six months' inhabitant householder. | Gregory Street. |
|---------------------|-----------------|-------------------------------------|-----------------|

Previously to the passing of the reform act, every person who had been an inhabitant householder within the borough of Northampton, for six calendar months next before the day of election, and who had not received parochial relief, or other alms, for the space of twelve calendar months then last, was entitled to vote in such election.

Kitchener, at the time of the passing of the reform act, had a right to vote, as an inhabitant householder, for the borough of Northampton, and has ever since, with the exception hereinafter mentioned, been an inhabitant householder in that borough.

He was duly registered in the first registration under the provisions of the act, and has never since been omitted for two successive years, except in consequence of his having received parochial relief.

In October, 1832, Kitchener and his family ceased to reside at Northampton, and went to reside at Bedford, where he remained for fourteen weeks; he then came back to Northampton, and immediately became an inhabitant householder, and has so continued up to the present time.

He has, in every year since the passing of the reform act, been an inhabitant householder, duly qualified according to the usages and customs of the borough of Northampton, on the last day of July in each year.

It was objected that, by reason of his having ceased to be an inhabitant householder for fourteen weeks, as above mentioned, he was no longer entitled to retain his reserved right of voting as an inhabitant householder.

I decided against the objection, being of opinion that, inasmuch as his
 *101] absence from Northampton occurred *during a period which was
 not necessary to qualify him as an inhabitant householder in any
 year, that is to say, between the months of July and February, he came
 *102] within the saving of the 33d section of the reform act, (a) *and I
 accordingly retained his name on the list of voters for the parish of
 All Saints.

(a) Which enacts, "that no person shall be entitled to vote in the election of a member or members to serve in any future parliament, for any city or borough, save and except in respect of some right conferred by this act, or as a burgess or freeman, or as a freeman and liveryman, or in the case of a city or town being a county in itself, as a freeholder or burgage tenant, as hereinbefore mentioned: *Provided always*, that every person now having a right to vote in the election for any city or borough except, &c., in virtue of any other qualification than as a burgess or freeman, &c., as hereinbefore mentioned, shall retain such right of voting so long as he shall be qualified as an elector according to the usages and customs of such city or borough, or any law now in force; and such person shall be entitled to vote in the election of a member or members to serve in any future parliament for such city or borough, if duly registered according to the provisions hereinafter contained*; but that no such person shall be so registered in any year, unless he shall, on the last day of July in such year, be qualified as such elector in such manner as would entitle him then to vote, if such day were the day of election and this act had not been passed; nor unless such person, where his qualification shall be in any city or borough, shall have resided for six calendar months next previous to the last day of July in such year within such city or borough, or within seven statute miles from the place

(The case then stated that the revising barrister also retained the names of five other persons, and that these cases were consolidated with the principal case.) (Signed) J. M., revising barrister.

Humfrey, for the appellant. As the party objected to had ceased to be an inhabitant householder within the borough, he could not be said to *retain* his right of voting, within the meaning of the 2 W. 4, c. 45, s. 33. [CRESSWELL, J. The question is, whether he could have voted if the election had taken place at the end of the fourteen weeks during which he was absent from the borough. It comes to this—can a party who has once lost his qualification ever regain it?] It is submitted that he cannot. It was the intention of the legislature to put an end to the various rights of voting which existed in different boroughs, and to establish one uniform qualification throughout the country; at the same time preserving existing rights, so long as the parties who possessed them remained in the same condition. The reservation of these old rights must be strictly construed. [TINDAL, C. J. The right here was vested in inhabitant householders, who had been so for six months before the day of election. Before the passing of the 2 W. 4, c. 45, this party would have had that right when he returned to the borough. The question may be whether the *whole* right was not reserved by the act.] He could not have voted if the election had occurred at the expiration of the fourteen weeks of his absence. [ERLE, J. Or within six months afterwards.] If, therefore, the absence in this case commenced at the end of October, the fourteen weeks would come down beyond the following January; and then the party would not have been qualified on the 31st of July, which, by a *subsequent part of the [103 section, is substituted for the day of election, as the test of the right of the party to vote; inasmuch as he would not have been a resident householder for six months before the 31st of July. [ERLE, J. It appears that the absence must have commenced at the *beginning* of October, as the case states that in every year since the passing of the reform act, the party had been an inhabitant householder duly qualified on the last day of July.] It is not necessary, however, to rely on the argument as to the 31st of July, as it is submitted that the moment a party ceases to be an inhabitant householder, he loses his right. [CRESSWELL, J. It will probably be contended on the other side, that when he came back he was remitted to his former right.] The right was gone for ever, and he could not, therefore,

where the poll for such city or borough shall heretofore have been taken, nor unless such person, where his qualification shall be within any place sharing in the election for any city or borough, shall have resided for six calendar months next previous to the last day of July in such year, within such respective place so sharing as aforesaid, or within seven statute miles of the place mentioned in conjunction with such respective place so sharing as aforesaid, &c.: *Provided nevertheless*, that every such person shall for ever cease to enjoy such right of voting for any such city or borough, as aforesaid, if his name shall have been omitted for two successive years from the register of such voters for such city or borough hereinafter directed to be made, unless he shall have been so omitted in consequence of his having received parochial relief within twelve calendar months next previous to the last day of July in any year, or in consequence of his absence on the naval or military service of his majesty."

be remitted to it. If, when he returned, he gained any thing, it would be a new right, and not the old right. During his residence at Bedford, he clearly could not have voted, or have been said to retain the right which he possessed when the reform act passed; and ~~the~~ clause applies to parties only who *retain* their old rights, and not to ~~those~~ who may gain new rights. There is no hardship on the voter, as he voluntarily abandoned his right. Even if, by mistake, he is left off the register for two successive years, he loses his qualification. [MAULE, J. His trying to regain it after that time might look like occasionality.]

Waddington, for the respondent. The argument on the other side must go this length,—that, if a party cease to be an inhabitant householder for the shortest time, his right is gone for ever. It is submitted, however, that this is a personal privilege which is reserved to the voter. [ERLE, J. The act says that “every person shall retain such right of voting *so long* as he shall be qualified as an elector according to the usages and customs of such
 *104] *city or borough.*”] The words “*so long*” have not so stringent a meaning as is contended for on the part of the appellant. As matter of history, it may be stated, that it was originally the intention of those who introduced the reform bill to establish one uniform right of voting in all boroughs throughout the kingdom, and to abolish all existing franchises. This proposal was resisted; and all existing rights were reserved to the parties who enjoyed them at the time the act was passed. The meaning of the saving clause in the thirty-third section is, not that the party is to enjoy his right merely so long as he retains the identical qualification of which he was then possessed; he is to have the right of voting so long as he is qualified by the custom of the borough. [MAULE, J. Did not the legislature mean, we will not disqualify a party so long as he does not disqualify himself? You say the meaning of the clause is, so long as the party retains *some* qualification.] It is not necessary that the qualification should be continuous, if, by the usage of the borough, the party would still retain his right. The clause further provides, that no such person shall be registered, unless he shall, on the last day of July, be qualified in such manner as would entitle him then to vote, if such day were the day of election. “Such person” means the person as before described. All that is required, therefore, is, that, on the 31st of July, this party should have been entitled to vote, by the custom of the borough; and it appears, that he was so entitled. The proviso at the end of the section, as to the omission of the name of a party for two successive years, must refer to an omission owing to a want of qualification; that is, a party is to lose his right, where he has been disqualified for two years; otherwise it might be a great hardship on borough voters who are not required to send in a claim to have their names inserted in the list, as is the case with county voters.
 *105] [ERLE, J. It appears to me that the words “every such person,” in the proviso just referred to, must mean—every person who has retained his right. MAULE, J. A borough voter *may* send in a claim if

his name is omitted from the list. And the meaning of the clause may be, that if he does not claim for two years when his name has been omitted, it may be inferred that he does not care about the franchise. The term "omitted" implies that something which ought to have been done has not been done.] That can hardly be the proper construction of the proviso, as it mentions two exceptions in which the name of a party would be properly omitted, but where the omission is not to disqualify. [CRESSWELL, J. A party could not object to the omission of his name on either of the grounds mentioned.] Some difference is made in the law in this respect by the seventy-eighth section of the 6 & 7 Vict. c. 18.(a) It is thereby provided that the party shall lose his right if his name has been omitted for two successive years, in respect of the ancient franchise, though it may have been inserted in respect of "some qualification of a different nature. [CRESSWELL, J. That clause is declaratory.] It rather [*106 strengthens the present argument. It shows that an omission from the register means an omission from a particular list. [ERLE, J. You would say, therefore, that it would make no difference if a party had ceased to be an inhabitant householder for one entire year, and had been omitted from the list on that account.] The argument undoubtedly must go that length.

Humfrey, in reply, was stopped by the court.

TINDAL, C. J. It appears to me impossible to read the provisions of the 2 W. 4, c. 45, without perceiving that it was the intention of the legislature that thenceforward there should be only one right of voting in boroughs,—namely, in those parties who are commonly called 10*l.* householders. It was probably, however, thought hard, that persons who were already possessed of a franchise of a different nature, should lose that franchise by the sweeping provisions at the commencement of the 33d section; and, therefore, the proviso was introduced, that every person then having a right to vote for any city or borough, shall "retain such right of voting so long as he shall be qualified according to the usages and customs of such city or borough."

The qualification in the present case is set up by a person who was qualified to vote in the borough of Northampton, on the 7th of June 1832, the day on which the act received the royal assent, as an inhabitant house-

(a) Which, "after reciting the first proviso in the thirty-third section of the 2 W. 4, c. 45, (down to the mark * *suprà*, p. 101, n.(a),) and the second proviso in the same section: and that "doubts have arisen as to the intent and meaning of the words, 'the register of such voters' in such last-mentioned provision;" declares and enacts, "that every such person shall for ever cease to enjoy such right of voting in virtue of any other qualification than as a burgess or freeman, &c. as aforesaid, if his name shall for two successive years not have been inserted or appear in the register of voters for such city or borough, in respect of such other qualification, (notwithstanding the name of such person may appear in such register for both, or either of the same two successive years, in respect of some qualification of a different nature,) unless the name of such person in any such year shall not have been inserted as aforesaid, or (shall) have been omitted by reason or in consequence of his having received parochial relief within twelve calendar months next previous to the last day of July, in the same year, or by reason or in consequence of his absence on the naval and military service of her majesty.

holder within the borough; and the question is, whether he has *retained* that right. Now, I think the proviso in question must, in this case, be read and interpreted thus: so long as he shall continue to be an inhabitant-householder within the borough. On the part of the respondent, it is said *107] that this is too stringent a *construction; and that the meaning of the proviso is,—so long as he shall continue to be an inhabitant householder, or, if having ceased to be an inhabitant householder, he shall afterwards become one again. But that would have the effect of giving him a right to acquire a *new* franchise, and not simply to retain an old one. If the act had never passed, and the party had gone away from the borough, and after a length of time had come back to inhabit as a householder, and had so inhabited for six months before an election, he would have had the right to vote,—not, however, in respect of his old qualification, but in respect of a new one. It seems to me that the words of the proviso are simple enough, and that the subsequent negative words—“that no such person shall be registered, unless he shall on the last day of July be qualified as such elector in such manner as would entitle him then to vote if such day were the day of election, and this act had not passed”—have no bearing upon the present question. The words “such person” show that the sentence is limited to the actual qualification possessed at the passing of the act.

MAULE, J. I think the intention of the legislature was to retain the right of voting to persons who did not part with it by their own voluntary act; but that parties who either ceased to be inhabitants, where that was the qualification, as here, or who allowed their names to be omitted from the register for two years, should lose their franchise. They were to retain their right so long as they were qualified. The word “retain” is a word of time and continuity. If a party had lost one qualification, and had *immediately* gained another of the same species, possibly the case might have been different.

CRESSWELL, J. I am of the same opinion, and think the vote of the *108] respondent ought to have been disallowed. *The words of the proviso under consideration are very clear. The respondent had lost his right of voting by going away from the borough. If an election had taken place during his absence, he could not have voted. When he came back he did not *retain* his old qualification. The subsequent part of the same proviso points to an additional qualification of the right. It provides that no such person shall be registered unless he shall, on the 31st of July, be qualified in such manner as would entitle him then to vote if that were the day of election. This appears to point to the statute against *occasional voters*.(a) And in this borough, a party would not have been qualified “in such manner as would entitle him to vote,” unless he had been an inhabitant householder for six months before the 31st of July.

ENLE, J. I also agree as to the construction of this section. The earlier

part of the act creates certain new rights of voting, and recognises the existence of certain others. Then the 33d section excludes all other rights except those of parties who had a right of voting at the passing of the act, and who are to retain such right, so long as they shall be qualified according to the usages of the borough. The act, therefore, contemplates rights held by parties at the time the act passed; which rights they are to retain so long as they shall be qualified. This implies *continuity* of the qualification. I incline to think, that if there were two distinct rights existing in a borough, and a party had first one and then the other, he would probably be within the protection of this section. But that is not the present case. A subsequent part of the proviso in question, contains a further exception. And the proviso at the end of the section declares that an omission from the register for **two successive years*, for any cause but the two which [*109 are mentioned, shall operate as a disfranchisement.

Decision reversed.(a)

(a) BOROUGH OF NORTHAMPTON.

JOHN STANTON, Appellant, and JOHN JEFFREY, Respondent.

In this case, which was an appeal from the same revising barrister, the facts were the same as in the principal case, except that the party objected to (James Adson) and his family left Northampton at Christmas, 1841, and went to reside elsewhere for *nine months*, having during all that time ceased to occupy any house within the borough; and at the end of nine months, he came again with his family to reside at Northampton, where he had ever since been an inhabitant householder.

Adson and thirteen other parties under similar circumstances having been objected to, the barrister expunged their names; and the cases were consolidated.

Waddington appeared for the appellant, and *Humfrey* for the respondent.

No argument was offered.

Per curiam;

Decision affirmed.

BOROUGH OF WESTBURY.

JOHN DYER, (for himself and other parties interested,) Appellant;
EBENEZER GOUGH, Respondent. Jan. 20.

Assessors and collectors of window tax are not disqualified from being registered as electors.

CASE. The name of John Dyer appeared upon the list of persons entitled to vote in the election of a member for the borough of Westbury, in respect of property situate in the parish of Westbury.

A notice of objection was duly served upon Dyer and upon the overseers of Westbury, against his right to have his name retained upon the list of voters for the said borough.

*Upon Dyer appearing and being called upon to prove himself [*110 entitled to have his name retained upon the said list, it was shown that Dyer, at the time of making out the said list of voters, has been, and still was, a person employed in collecting the duties on windows; and that had been appointed such collector by a warrant and appointment under

the hands and seals of two of the commissioners for executing the several acts of parliament relating to the duties of assessed taxes. It was admitted that the two commissioners making the said appointment were also commissioners of the land tax; but this fact did not appear in any way recited or otherwise upon the said appointment.

The revising barrister was of opinion, that Dyer was not entitled, on the last day of July, 1844, to have his name inserted in the list of voters for the said borough, inasmuch as it appeared to the said barrister, that Dyer had been at the time of making out the said list, and still was, a person employed in collecting the duties on windows within the meaning of the 22 G. 3, c. 41, s. 1; (a) and he expunged his name accordingly.

*111] "The question for the opinion of the court is, whether the revising barrister was right in so deciding. If the court are of opinion that the revising barrister was right, the name is to remain expunged, if otherwise, the name is to be inserted in the list of voters.

(Signed) F. W. S., revising barrister.

(The cases of eight other parties were consolidated with the above case.)

Shee, Serjt., (with whom was *Gunning*,) for the appellant. It will be contended on the other side, that the parties, on whose behalf this appeal is prosecuted, are disfranchised by sect. 1 of the 22 G. 3, c. 41, as being persons "employed in collecting or receiving the duties on windows or houses." But it is submitted that they come within the exception contained in sect. 2, as "acting under the appointment of commissioners of the land tax." That exception applies to persons so appointed "for the purpose of collecting," &c. not only "the land tax," but also "any other rates or duties hereafter to be granted or imposed by authority of parliament." By *112] one of the early statutes on the subject, the 20 G. 2, c. 3, s. 6, (b) "all persons appointed to be commissioners of the land tax by the 20 G.

(a) Vide *supra*, p. 98, n. (a). The act is intitled "An act for better securing the freedom of election of members to serve in parliament, by disabling certain officers, employed in the collection or management of his majesty's revenues, from giving their votes at such elections."

Among the persons enumerated in sect. 1 of the act, as incapable of voting, are "any surveyor, collector, comptroller, inspector, officer or other person, employed in collecting, managing, or receiving the duties on windows or houses."

Sect. 2, provides, "that nothing in this act contained shall extend, or be construed to extend, to any commissioner of the land tax, or any person acting under the appointment of such commissioners of the land tax, for the purpose of assessing, levying, collecting, receiving, or managing the land tax, or any other rates or duties already granted or imposed, or which shall hereafter be granted or imposed, by authority of parliament."

By sect. 4, it is provided, "that nothing herein contained shall extend to any person who shall resign his office or employment, on or before the 1st of August, 1782," (the day the act was to come into operation.)

(b) 20 G. 2, c. 3, intitled, "An act for repealing the several rates and duties upon houses, windows and lights, and for granting to his majesty other rates and duties upon houses, windows, and lights,"

Enacts, sect. 6, that "all and every the persons named or appointed to be commissioners for putting in execution an act of this present session of parliament, intitled, "An Act for granting an aid to his majesty by a land tax, &c.," (20 G. 2, c. 2,) or by any other act or

2, c. 2, or any other act, are appointed commissioners for the taxes on houses and windows. The 20 G. 2, c. 3, was in force at the time the disqualifying act 22 G. 3, c. 41, was passed; and the excepting section of the latter act would apply to parties appointed collectors in the manner mentioned in the previous statute. This has invariably been the construction put upon the statute by committees of the House of Commons, as in the *Bedfordshire* case, 2 Lud. 541, (a) and others. [TINDAL, C. J. To what parties, then, would the disqualification in the first section be applicable?] It would apply to the *surveyors* and *inspectors* of the assessed taxes, who, by the 30th and 43d sections of the 20 G. 2, *c. 3, were to be appointed [*113 and paid by the lords of the treasury. [ERLE, J. The provisions of the first section of the 22 G. 3, c. 41, appear to be intended to apply to persons appointed by the crown, whose interference at elections would be mischievous.] The 38 G. 3, c. 48, ss. 1 and 2, required the land-tax commissioners, acting in cities or boroughs, to have landed property of the value of 40*l.* per annum, or personal estate to the amount of 1000*l.*; and in counties, landed property of the value of 100*l.* per annum. And the 43 G. 3, c. 99, s. 4, (b) enacts, that the commissioners of taxes, generally,

acts of parliament thereby referred unto, or who shall hereafter be named or appointed commissioners for putting in execution any future act or acts of parliament, for granting an aid to his majesty, &c., by a land tax, shall be commissioners for putting in execution this present act," &c. It then provides for the time and place of the commissioners' meeting, and empowers them to divide themselves, and to "direct their several or joint precept or precepts to such inhabitants, and such number of them, as they, in their discretion, shall think most convenient to be presentors and assessors, requiring them to appear before the said commissioners, &c., and at such their appearances the said commissioners, &c., shall openly read, &c., the several rates and duties in this act mentioned, and openly declare the effect of their charge unto them, and how and in what manner they ought and should make their certificates and assessments, according to the several rates aforesaid," &c. It also empowers the commissioners to prefix a day for the assessors to bring in their certificates; and the assessors shall also then return the names of two or more able and sufficient persons, within the bounds or limits of those parishes or places where they shall be assessors respectively, to be *collectors* of the several rates and duties, &c., for whose paying unto the receiver-general, &c., such money as they shall be charged withal, the parish or place by whom they are so employed shall be answerable," &c.

By sect. 7, the particular duty of the *collectors* is prescribed, and they are required to pay over their receipts to the receiver-general, his deputy or deputies.

By sect. 9, the collectors are enjoined and required to collect and pay, &c., under the several penalties and forfeitures in the act provided.

Sect. 30 empowers the *lords of the Treasury* to appoint *surveyors* and *inspectors* for examining and controlling the assessments and certificates of the collectors, with full powers for the above purposes.

Sect. 43 empowers them to give salaries to the *surveyors* and other officers for their service.

(a) See 2 Lud. 552, and *Staple's* case, *Middlesex*, 3 Peckw. 116. See also Ell. Reg. 281, 2d edit.

(b) 43 G. 3, c. 99, "for consolidating certain of the provisions contained in any act or acts relating to the duties under the management of the commissioners for the affairs of taxes, and for amending the same."

By sect. 1, all duties, then under the management of the commissioners for the affairs of taxes, were to be levied under the regulations of that act, *except the land tax*.

By sect. 4, no person was to act as a commissioner of (general) taxes, unless qualified as required by the 38 G. 3, c. 48, so far as related to the qualification of land-tax commissioners.

By sect. 7, the qualification of commissioners under that act, in London, Westminster, &c., was fixed at 5000*l.*

By sect. 9, the commissioners were to appoint assessors, who are to return the names of persons to be collectors.

(including therefore the window tax,) are not to act unless qualified as commissioners of the land tax. The collectors, who are compelled to take the office, are in *no way appointed by the crown, and are not within the *114] mischief contemplated by the disqualifying act. [MAULE, J. If justices of the peace were appointed commissioners, when they acted as commissioners they would not act as justices of the peace. CRESSWELL, J. The collectors, although actually appointed by the commissioners, are selected by the parties who pay the tax. The process appears to be this: the assessors apportion the sum to be levied, and then return the names of certain persons, as collectors, to the commissioners. There seems to be every reason why such collectors should be deemed not to be the servants of the crown.] It may even be questioned whether these collectors can be said, strictly, to be "*employed* in collecting the duties on windows," within the words of the disqualifying section. In the case of parties connected with the post-office, the words are, "any postmaster, &c., or any person *employed by or under him* or them."

Cockburn, (with whom was *Kinglake*, Serjt.,) for the respondent. There is no reference, in the disqualifying section of the 22 G. 3, c. 41, to the fact of the parties there enumerated being servants of the crown, or to the nature of their appointment. The party objected to in this case holds a situation which falls within the express terms of that section. His exemption from its operation is claimed under section 2. But, if his case does not fall within that section, there is an end of the question, as no exemption can be *inferred*. If persons situated as the present party is, are appointed by commissioners of the land tax, they undoubtedly fall within the exempting clause, and are not disqualified. It is not necessary to rely solely upon the point, that the appointment in these cases is not made by the land-tax commissioners *quod* land-tax commissioners. It is submitted that the appointment is not made, or is not necessarily made, by *them at all. At the *115] time when the 22 G. 3, c. 41, was passed, the land-tax commissioners acted as assessed-tax commissioners; but, by the 43 G. 3, c. 99, an entirely new set of commissioners was constituted, who were required, it is true, to have the same qualification as the land-tax commissioners, but were not required to be the same persons. By a later act of the same session, 43 *116] G. 3, c. 161, (a) new duties were imposed upon various *matters, in-

By sect. 12, the commissioners were to appoint collectors out of the parties returned by the assessors.

By sect. 13, the collectors were to give security for paying over the moneys received by them.

By sect. 15, within the bills of mortality, &c., the appointment of collectors was to belong to the resident commissioners.

By sect. 16, assessors or collectors, refusing to take the office, or neglecting their duty, might be fined by the commissioners.

By sect. 20, the commissioners of the treasury might, from time to time, appoint officers for the survey and inspection of duties under the commissioners of taxes.

By other sections, the collectors were liable to heavy penalties for specific acts of neglect of duty.

(a) 43 G. 3, c. 161, intituled, "An act for repealing the several duties under the management of the commissioners for the affairs of taxes, and granting new duties in lieu thereof, &c.,

cluding windows. By sect. 5, the duties granted by that act were to be levied under the regulations of c. 99; and by sect. 6, the commissioners of the land tax, who should be qualified and should have taken the oaths as directed by c. 99, were to be commissioners for the affairs of taxes. [TINDAL, C. J. By sect. 8, the assessors and collectors under c. 99 were to be assessors and collectors of the duties granted by c. 161, and the commissioners, or other officers, were to execute the powers of the first act, and under the like penalties for neglect.] The effect of the two statutes, taken together, is this: c. 99 appoints a new set of commissioners for the assessed taxes; c. 161 grants new duties, and enacts that the commissioners for the land tax, if they are duly qualified, and have taken certain oaths, shall be commissioners for the assessed taxes; but the assessed-tax commissioners under the former act were not abrogated, nor were they appointed land-tax commissioners. CRESSWELL, J. In what manner would the assessed-tax commissioners have been appointed if the latter act had not passed? They would have been appointed under c. 99. [ERLE, J. It does not appear that that act gives any express power of appointment.] The power in the crown of appointing commissioners of taxes would be inferred. [CRESSWELL, J. *Assuming that to be so, and that before c. 99 the crown had no power to appoint separate commissioners for the [*117

for repealing the duties on excise, &c., and granting new duties thereon, under the management of the said commissioners for the affairs of taxes; and also new duties on persons selling carriages," &c.

By sect. 5, it is enacted, "that all the several duties hereby granted in England, &c., shall be assessed, raised, levied, and collected, under the regulations of an act passed in the present session of parliament, (c. 99,) and all the several duties hereby granted in Scotland shall be assessed, &c., under the regulations of any act passed or to be passed in the present session of parliament, &c.; and all and every the powers, authorities, &c., &c., contained in the said acts, shall be severally and respectively duly observed, &c., as fully and effectually, to all intents and purposes, as if the same powers, &c., were particularly repeated and re-enacted in the body of this act; and all and every the regulations of the said acts shall be respectively applied, &c., to this act, as if the same had been specially enacted therein."

By sect. 6, it is enacted, "that for the better execution of this act, and for the ordering, raising, collecting, &c., of the several sums of money hereby made payable, all and every the persons who now are, &c., commissioners for putting in execution an act passed, &c., (38 G. 3, c. 5, a land-tax act for 1798,) and who shall be respectively qualified or authorized to act, and shall have taken the oaths as directed by the said respective acts passed in the present session of parliament, shall respectively be commissioners for putting in execution this act, &c., and the several sums of money so levied shall be under the care and management of the commissioners for the affairs of taxes for the time being appointed or to be appointed by his majesty," &c.

By sect. 8, it is enacted, "that the assessors and collectors appointed by the said commissioners for any parish, &c., in pursuance of the said recited acts respectively passed in the present session of parliament, shall be the assessors and collectors of the several duties granted by this act, &c.; and the several commissioners, inspectors, surveyors, assessors, and collectors, are hereby empowered to do and execute all matters and things in relation to the duties by this act granted, which they respectively are empowered to do, &c., in relation to the duties mentioned in the said recited acts respectively, and shall severally be subject and liable to the like penalties for any neglect," &c., &c.

By sect. 9, the inspectors and surveyors under the said acts are to be inspectors and surveyors under that act.

By sect. 78, the commissioners of the treasury are to appoint salaries to the surveyors, inspectors, and other officers employed in the execution of the act.

By sect. 79, the receivers-general, collectors, and clerks to the commissioners are to receive a certain poundage upon all moneys received or paid over by them.

assessed taxes, the question would be, whether c. 161 gave any greater powers. MAULE, J. The commissioners have salaries, which must be granted by act of parliament.] Still, even assuming that the land-tax commissioners are commissioners of the assessed taxes *ex officio*, yet, as they have to take a fresh oath, they hold a different office. The appointment of collector of assessed taxes is made by the commissioners of assessed taxes, *as such*. [MAULE, J. That brings the question round to the argument whether the land-tax commissioners do not, *quod* land-tax commissioners, appoint the assessed-tax collectors, so as to bring the latter within the exception in s. 2.] In the argument in *Collins v. Gwynne*, 7 Bingh. 423, 5 M. & P. 276, 9 Dowl. P. C. 70, the distinction between the two sets of commissioners was pointed out.

Shee, Serjt., was not called upon to reply.

TINDAL, C. J. The question in this case arises, mainly, upon the construction of the 22 G. 3, c. 41. If it depended only upon the first section of that act, no doubt the present party would be disqualified, inasmuch as he is a "person employed in *collecting*, managing or receiving the duties on windows," within the very terms of that section. But the second section professes to except certain cases out of the range of the disqualifying enactment, and the question is, whether the present party comes within the operation of that section. It appears to me that he does. The second section provides, "that nothing in the act contained shall extend to any commissioner of the land tax, or any person acting under the appointment of such commissioners of the land tax." Now, if we were to pause there, *118] perhaps this party *would not be excepted from the general terms of the disfranchising section; but the second section goes on to say, "for the purpose of assessing, &c., the land tax, or *any other rates or duties* already granted or imposed, or *which shall hereafter be granted or imposed*, by authority of parliament." Other duties have been imposed by subsequent acts—the 43 G. 3, c. 99, and c. 161,—which are under the management of the land-tax commissioners. The appointment of this party is under the hands of two persons, who are land-tax commissioners; and parties so appointed have certain onerous duties cast upon them. I am of opinion, upon the whole, that no disqualification ever existed in the present case, and that it would be a strained construction of the act if we were to disqualify parties in the situation of those now objected to.

MAULE, J. I am of the same opinion. These parties at common law, that is, independently of any disqualifying statute, would have had a right to vote. It is said this right is taken away by the provisions of the 22 G. 3, c. 41, s. 1. That section enumerates several classes of persons, there being no one word in the language to describe all the persons intended to be disqualified. The second section limits the former description. I think that these parties come within the latter section. The 43 G. 3, c. 99, contains no provisions as to the appointment of the commissioners, probably for the reason that c. 161 was about to pass, in which such provisions were to be

contained. That latter statute in effect says that the commissioners to carry out that act must be commissioners of the land tax. It comes therefore to this; a person in the situation of these parties, at the time of the passing of the stat. 22 G. 3, c. 41, would not have been disfranchised. But, under the operation of all the statutes, no one could be appointed to such a situation *except by the commissioners of the land tax. These parties [119 therefore are within the exception of section 2 of the 22 G. 3, c. 41. There is nothing in the spirit of the acts to show that the words are to be construed in the narrower sense; and there is every thing to show the contrary, the collectors being chosen by popular election, and not appointed by the crown.

CRESSWELL, J. I also am of the same opinion, and think the vote must be allowed, on the ground that the second section of the 22 G. 3, c. 41, saved the right of persons in the position of the present parties. That section speaks of "other rates or duties *already* granted or imposed." It appears, therefore, that at that time the commissioners of land tax might collect other duties besides the land tax. The subsequent acts only enlarged their powers.

EMLE, J. It appears to me also that these parties were qualified. The description in the 22 G. 3, c. 41, s. 1, is clearly intended to apply to persons appointed by the crown. At the time when that act passed, there were two sets of persons who might be called *collectors*; one class, elected by the people and appointed by the land-tax commissioners; another appointed by the treasury; those of the latter class being *salaried* officers. The object of the second section appears to have been, to save the rights of the former class. By the two statutes of the 43 G. 3, the commissioners of the assessed taxes were virtually required to be commissioners of the land tax. The appointment of these collectors is by the commissioners of the land tax, acting as commissioners for the assessed taxes. It is rather an *additional function*, which the former exercise. The reason of the thing, too, is with the present judgment. These collectors have no appointment from the crown. And it is to *be observed that the fourth section of the [120 22 G. 3, c. 41, provides that the disqualifying section shall not apply to a person who resigns his situation; but collectors appointed as the present party was, have no power to resign. In the case of Baxter, appellant, and *The Overseers of Doncaster*, respondents,(a) which will be

(a) WEST RIDING OF YORKSHIRE.

BAXTER, Appellant; The Overseers of DONCASTER, Respondents.

THIS case raised the same question as the principal case, with regard to two parties who were collectors, and two others who were assessors, of assessed taxes, in different townships. The case contained the following statement:—

"The respective appointments were made by the local commissioners of assessed taxes, the names of two persons in every township being annually returned to the said commissioners, who compelled the parties so returned to take the office on them.

"The local commissioners of assessed taxes are selected from the body of the land-tax commissioners, and upon their appointment to act as assessed-tax commissioners, they take an oath

decided by the present one, it is stated that the office of collector is compulsory.

Decision reversed.

of office as assessed-tax commissioners, and whilst acting as commissioners of assessed taxes, they still retain their character of commissioners of the land tax."

The revising barrister retained the names of the parties.

The case was argued in last Michaelmas term, (21st November, before TINDAL, C. J., COLTMAN, MAULE, and ERLE, J.,) by

Hildyard, Q. C., for the appellant, and *Sir G. Lewin*, for the respondents. The stats. 20 G. 2, c. 3, 22 G. 3, c. 41, and 43 G. 3, c. 99, were referred to; and also the case of *Williams v Prichard*, 4 T. R. 2.

The argument is not reported, as it was mainly the same as in the principal case; and the court said, as there was another case upon the same point, they would defer their judgment.

Per curiam;

Decision affirmed.

BOROUGH OF CAMBRIDGE.

CHARLES HENRY COOPER, Appellant; CHARLES PESTELL HARRIS, Esq.,
Town Clerk of CAMBRIDGE, Respondent.

(CLENISHAW'S CASE.)

THIS case also raised the same question with regard to a clerk to a receiving inspector of taxes.

*The case set out the second section of the 1 & 2 W. 4, c. 18, whereby it is enacted,
*121] "that in lieu and the place of the receivers-general to be discontinued under this act, it shall and may be lawful to and for the said commissioners of his majesty's treasury, for the time being, to nominate and appoint, from time to time, such of the persons for the time being appointed to execute the offices and duties of inspectors of taxes, to be officers or persons for the receipt of the land tax, and of moneys paid for the sale and redemption thereof, and the respective rates and duties of assessed taxes under the management of the commissioners for the affairs of taxes within and for such counties, districts, and circuits of receipt, as the said commissioners of the treasury shall, from time to time, authorize or direct; and it shall also be lawful for the said last-named commissioners to grant annual allowances to such receiving inspectors, as a remuneration for executing and performing the additional duties imposed on them by this act, and for the expense of a clerk, not exceeding on an average the sum of 100*l.* for such remuneration, and a like sum of 100*l.* for such clerk."

The case then stated that the person whose vote was objected to, had been for some years, and was then, employed in the capacity of a clerk to a receiving inspector appointed under the above enactment. He was in the habit of assisting the receiving inspector in the receipt of the window duties and other taxes from the collectors. Before the passing of the 5 & 6 Vict. c. 35, he had taken no oath of office; but after the passing of that act, he took the oath for collectors and officers for receipt given in the schedule F. annexed to that act. It appeared that he had in no other way been recognised as a public officer; that his salary was fixed and paid; that he was appointed, and was liable to be discharged, by the receiving inspector, and that sometimes the receiving inspectors received the duties without employing any one at all in that capacity:—

It was contended that Clenishaw was not entitled to have his name inserted in the list of voters, inasmuch as he was rendered incapable of voting by the 22 G. 3, c. 41, but the revising barrister retained Clenishaw's name upon the list.

The case was argued in this term (January 23d) by

Gunning, on behalf of the appellant. The argument was to the same effect as that which was offered on the part of the respondent in the principal case. No one appeared for the respondent. No judgment was publicly pronounced; but it was understood that the case was considered as governed by the principal case; and the decision of the revising barrister was

Affirmed

CITY OF BRISTOL

[*122]

JAMES DANIEL, Appellant; and JOHN COULSTING, Respondent.
Jan. 23.

A building calculated to be used as a dwelling-house, though not used as such, is properly described as a "house."

CASE. James Daniel objected to the name of Henry Fargus being retained upon the householders' list of voters in the parish of St. Stephen.

The voter's qualification, as stated upon the list, was "house."

Fargus rents a building, No. 4 Clare street, which consists of apartments, once used as kitchens, shop, sitting-rooms and bed-rooms, and which possesses the usual conveniences to fit it for a dwelling-house. It is, in fact, every way calculated for a dwelling-house, and has been used as such; and the houses on each side, precisely similar to it in appearance, are occupied as dwelling-houses; but Fargus occupies the greater portion of the building himself, partly for warehousing goods, and partly for a sale-room. Some of the upstairs apartments, not so occupied, he lets off to be used as workshops. No one resides upon the premises. They are rated to the poor as "dwelling-house and shop," but no assessed taxes are paid for them.

The objection was, that the building, being now used solely for the purposes stated, the qualification on the list ought to have been "warehouse and shops."

It was contended, on the other side, that the qualification was properly described; but, for the purpose of "more clearly and accurately defining the same," I was requested to add to the word "house" the words "now used as warehouse and shop." I decided, that "the premises [No. 4 Clare street, being to all intents and purposes a house, though not now used as a dwelling-house, the word "house" was a sufficient description of the qualification. And I further decided, that if it were necessary to make the proposed alteration, I had the power to do so; and I added to the qualification the words which had been suggested. [*123]

(The cases of six other parties were consolidated with the principal case.)

If the court are of opinion that the word "house" sufficiently described the qualification, or that I possessed the power of correction which I exercised, then the seven names are to remain upon the register; but if the court are of opinion that "house" was not sufficiently descriptive of the qualification, and that I had no power to amend the description, then these names are to be expunged from the register.

(Signed) T., revising barrister.

Kinglake, Serjt., for the appellant. A claimant is clearly bound to select the most appropriate term by which to describe the premises, in respect of the occupation of which he claims the franchise. In such a case the revising barrister has no power of amendment, and the claim must stand or

fall by the description given. The list published by the overseers may be considered as equivalent to a claim by the party; for, if the description in the list be incorrect, the party may send in a claim containing a proper description; and, by not doing so, he must be taken to adopt the description inserted in the list. The list operates as a notice to all the world; and it is of the utmost importance that the description of the qualifying premises therein should be correct. The power of correction, given to the revising barrister by the fortieth section of the registration act, does not *124] apply to a case like the present, where the *misdescription is in a material point. The premises in this case are wrongly described as a "house," which means a *dwelling-house*. [CRESSWELL, J. The act does not contain the word "dwelling-house." TINDAL, C. J. What description ought to have been adopted?] The premises should have been described as a "warehouse." [TINDAL, C. J. If they had been so described, the objector would probably have said that the building was a *house*. ERLE, J. Only part of the building is used as workshops. CRESSWELL, J. If a house were used as an "eating-house," must it be so described?] There is no such description in the statute. In *Elsmore v. The Inhabitants of the Hundred of St. Briavell's*, 8 B. & C. 461, 2 Mann. & Ryl. 514, a building intended for, and constructed as, a dwelling-house, but which had not been completed or inhabited, and in which the owner had deposited straw and agricultural implements, was held not to be a "house, outhouse, or barn," within the meaning of the statute 9 G. 1, c. 22, s. 7, so as to entitle the owner to maintain an action against the hundred for an injury sustained by him in consequence of a malicious setting on fire. [CRESSWELL, J. The building in that case was not a house at all. It was not finished. It was assumed in the argument that the statute only applied to houses that could be the subject of burglary; which the building in question in that case could not be.] There can be no doubt that by the term "house" is usually understood a *dwelling-house*. The learned serjeant also referred to *Sweetman's case*, Alcock, Reg. Ca. 27.

Butt, for the respondent, was not called upon.

TINDAL, C. J. The qualification of the party is, in my opinion, properly *125] described in this case. The *question is, whether the building in question does or does not constitute a "house" within the twenty-seventh section of the 2 W. 4, c. 45. It seems to be contended that it is necessary that a house should be *dwelt in* by a party in order to confer the franchise; but all that the act requires is, that he should *occupy* it. Here, it is impossible to read the description of the building, without seeing that it is a house. It is calculated, indeed, for a dwelling-house, and might be so used again. A building divided into floors and apartments, with four walls, a roof, a door, and chimneys, would be considered, in ordinary parlance between man and man, as a house; and I see no reason why we should put a different construction on the term. If the building had been described as a "warehouse," it might have been said that only one part of

it was used for that purpose.(a) It clearly is not a "counting-house" or "shop." The term, "other building," is *nomen generalissimum*; and I cannot see by what term this building could have been so well described as by that of "house." Suppose a house, situated within the bounds of a borough, were let out for people to hold meetings in, or for the purpose of some society, it would not on that account cease to be a house.

It seems to me that the building in the present case is brought most clearly within the description of a "house;" and that the judgment of the revising barrister must be affirmed, and, in so very clear a case, with costs.

CRESSWELL, J.(b) There is not the least pretence for the objection to the barrister's decision. The twenty-seventh section gives the right of voting to the occupier *of a house. The overseers are required to state the qualifications in respect of which a party is entitled to vote; [*126 and they have stated the qualification in the present list, to be in respect of a house. It is argued that the word "house," in the act, means a dwelling-house; but there is nothing in the context of the act, or in the schedule, to support that position. The case of *Elsmore v. St. Briavells* turned upon the particular meaning of the statute 9 G. 1, c. 22, and it was not the object of that statute to alter the nature of the offence of arson. The inquiry in that case was, whether the crime of arson had been committed. But I am clearly of opinion, that the word "house" does not necessarily mean a dwelling-house.

ERLE, J. I am of the same opinion. The qualification of the party must be stated under one of the denominations used in the act, so as to be understood by a person using the English language. The building under consideration in this case is suitable for a dwelling-house; and no one would hesitate to call it a house. It is said, however, that because it is not dwelt in, it is not a house; but I have heard no reason in support of that proposition. It appears to me that the statute requires the description of the qualification to be stated in the list, in order that a party may have an opportunity of going and seeing if the premises correspond with the description so stated. The description here is quite intelligible, and it is the best that could have been given of the building in question.

Decision affirmed, with costs.

(a) And that part might not have been of sufficient value to constitute a 10l. occupation.

(b) Manle, J., was absent.

*127]

*CITY OF LONDON.

GEORGE WANSEY, Appellant; ROBERT THOMAS PERKINS,
Respondent. Jan. 23.

(QUIGLEY'S CASE.)

The note at the foot of the form No. 10 in sched. B. to the 6 & 7 Vict. c. 18, (being a form of notice of objection to be given to overseers in cities and boroughs,) states, "If more than one list of voters, the notice of objection should specify the list to which the objection refers."

Held, that this note applies only to those cases where the overseers make out more than one list; and therefore that it is not applicable in the city of London, where the overseers make out only the list of householders, the list of freemen being made out by the secondaries.

The above note not being added to form No. 11, (which is the form of the notice to be given to the party objected to:)

Held, that the foregoing does not apply to that form, and that the notice served upon the party objected to need not specify to what list the objection refers.

CASE. Robert Thomas Perkins, on the list of freemen of London and liverymen of the company of patten-makers entitled to vote in the election of members for the city of London, objected to the name of Patrick Quigley being retained in the list of persons entitled so to vote. Quigley's name was in the list of persons entitled to vote, published by the overseers of the parish of St. Anne and St. Agnes in the said city. The revising barrister expunged Quigley's name from the list, subject to the opinion of the court upon the following case:—

The notice of objection to the overseers, which had been duly served upon them, was as follows:

"To the overseers of the parish of St. Anne and St. Agnes, in the city of London.

"I hereby give you notice, that I object to the name of Patrick Quigley being retained in the list of persons entitled to vote in the election of members for the city of London.

*128] "Dated, this sixteenth day of August, one thousand eight hundred and forty-four.

(Signed) "ROBERT THOMAS PERKINS,
 "11 Meredith Street, Clerkenwell.

"On the list of voters, for the company of patten-makers."

The notice of objection, which was duly served upon Quigley, was as follows:—

"To Mr. Patrick Quigley, 6 Four-Dove Court.

"I hereby give you notice, that I object to your name being retained on the list of persons entitled to vote in the election of members for the city of London.

"Dated, this sixteenth day of August, one thousand eight hundred and forty-four.

(Signed) "ROBERT THOMAS PERKINS,
 "11 Meredith Street, Clerkenwell

"On the list of voters, for the company of patten-makers."

It was urged, on behalf of Quigley, that both of the notices of objection were insufficient, and that he could not be required to prove that he was entitled to have his name inserted in the list; and it was contended that inasmuch as in the city of London there are lists of freemen and liverymen as well as lists of parties entitled to vote in respect of a property qualification, and as there are as many lists of such last-mentioned parties, made out by the overseers, as there are parishes in the city, the notice of objection served upon the overseers should have specified the list to which the objection referred, pursuant to the note at the foot of the form No. 10, in schedule (B), (a) annexed to the 6 Vict. *c. 18, and that the notice served upon the said Patrick Quigley should, in like manner, have specified such list; as, although the said note was not, in fact, appended to the form No. 11, in the said schedule (B), it must be considered as applicable thereto. [*129]

On the other hand, it was contended, on behalf of Perkins, the objector, that the said note applied only to cities or boroughs in which the overseers had to make out more than one list or set of lists of voters; as, for example, where they had to make out lists of householders and of all other persons (except freemen) entitled to vote by virtue of any other right, (under sect. 13 of the said statute); (b) and as the lists of freemen [*130]

(a) The 6 & 7 Vict. c. 18, s. 17, enacts, "That every person whose name shall have been inserted in any list of voters for any city or borough, may object to any other person, as not having been entitled, on the last day of July next preceding, to have his name inserted in any list of voters for the same city or borough; and every person so objecting shall, on or before the 25th day of August in that year, give or cause to be given a notice, according to the form numbered (10) in the said schedule (B), or to the like effect, to the overseers who shall have made out the list in which the name of the person so objected to shall have been inserted; or, if the person objected to shall have been inserted in the list of freemen of any city or borough, except the city of London, then to the town-clerk of such city or borough; and every person so objecting shall give, or cause to be left at the place of abode of the person objected to, as stated in the said list, a notice, according to the form numbered (11) in the said schedule (B); and every notice of objection shall be signed by the person objecting."

Sched. (B), No. 10. "Notice of objection.

"To the overseers of the parish [or 'township'] of —, [or 'to the town-clerk of the city,' or borough,] of —, or otherwise, as the case may be.

"I hereby give you notice, that I object to the name of —, being retained in the list of persons entitled to vote in the election of a member [or 'members'] for the city [or 'borough'] of —.

"Dated this — day of —.

"(Signed) A. B., [place of abode,] on the list of voters for the parish of —."

"Note.—If more than one list of voters, the notice of objection should specify the list to which the objection refers; and if the list contains two or more persons of the same name, the notice should distinguish the person intended to be objected to."

No. 11. "Form of notice of objection to be given to parties objected to.

"To Mr. —,

"I hereby give you notice, that I object to your name being retained on the list of persons entitled to vote in the election of members [or 'a member'] for the city [or 'borough'] of —.

"Dated this — day of —.

"(Signed) A. B., [place of abode,] on the list of voters for the parish of —."

(b) The 6 & 7 Vict. c. 18, s. 13, enacts, "that the overseers of every parish or township shall, on or before the last day of July in every year, make out or cause to be made out, according to the form numbered (3) in the schedule (B) to this act annexed, an alphabetical list of all persons who may be entitled to vote in the election of a member or members to serve in parliament for such city or borough, in respect of the occupation of premises of the clear yearly

and liverymen were made out by the clerks of the respective companies, (under sect. 20 of the same act,) (a) the overseers having nothing to do therewith, *and as the notice was addressed to the overseers of the
 *131] particular parish in which the property was situated; that they, the said overseers, could not have been misled by the notice in question; and, further, that there was no necessity to consider the said note as applicable to the form No. 11 in the said schedule (B), which form had been strictly followed.

I decided that each of the said notices of objection was sufficient; being of opinion also, that if I rejected them, and did not require Quigley to prove that he was entitled to have his name inserted in the said list of voters, and there had been an appeal from my decision, and the court had reversed such decision, it would have been then too late to require Quigley to prove that
 *132] he was so entitled; and if the court had ordered his name *to be expunged from the said list, he would have been excluded therefrom without having had any opportunity to prove his qualification. (b)

I therefore required it to be proved that Quigley was entitled to have his name inserted in the said list of persons entitled to vote; and the same not value of not less than 10*l.*, situate wholly or in part within such parish or township, and another alphabetical list, according to the form numbered (4) in the said schedule (B), of all other persons (except freemen) who may be entitled to vote in the elections of such city or borough by virtue of any other right whatsoever, and in each of the said lists, the Christian name and surname of every such person shall be written at full length, together with his place of abode and the nature of his qualification; and where any person shall be entitled to vote in respect of any property, then the name of the street, lane, and the number of the house, (if any,) or other description of the place where such property may be situate, shall be specified in the list; and the said overseer shall sign such list, and shall forthwith cause a sufficient number of copies of the said lists to be written or printed, and shall publish copies of the lists on or before the last day of August," &c., &c.

(a) Sect. 20 enacts, "that for providing a list of such of the freemen of the city of London, as are liverymen of the several companies entitled to vote in the election of a member or members to serve in parliament for the city of London, the secondaries of the said city shall, on or before the 20th day of July in every year, issue precepts to the clerks of the said livery companies, requiring them to make out, or cause to be made out, at the expense of the respective companies, an alphabetical list, according to the form numbered (1) in the schedule (C) to this act annexed, of the freemen of London, being liverymen of the said respective companies, and entitled to vote in such election; and every such clerk shall sign such list, and transmit the same, with two printed copies thereof, to the secondaries, on or before the last day of July, who shall forthwith fix one such copy in the Guildhall, and one in the Royal Exchange, of the said city," &c., &c.; "and every person whose name shall have been omitted, in any such list of freemen and liverymen, and who shall claim to have his name inserted therein, as having been entitled, on the last day of July then next preceding, to have his name inserted in such list, shall, on or before the 25th day of August in such year, give or cause to be given a notice, according to the form numbered (2) in the said schedule (C), or to the like effect, to the secondaries and to the clerk of the company in the list whereof he shall claim to have his name inserted; and every person whose name shall have been inserted in any list of voters for the time being for the said city, may object to any other person as not having been entitled on the last day of July then next preceding to have his name inserted in any such livery list; and every person so objecting shall, on or before the said 25th day of August, give to such other person, or leave at his place of abode, as described in such list, a notice, according to the form numbered (4) in the said schedule (C), or to the like effect, and shall give to the secondaries, and to the clerk of that company in the list whereof the name of the person objected to has been inserted, notice, according to the form numbered (5) in the said schedule (C) or to the like effect; and the secondaries shall include the names of all persons claiming, and so objected to as aforesaid, in two several lists," &c., &c.

(b) Vide *antè*, p. 9, n.

having been proved to my satisfaction, I expunged Quigley's name from the said list.

If the court are of opinion that either of the said notices of objection was insufficient, Quigley's name is to be inserted in the register of voters for the said city. (Signed) T. J. A., revising barrister.

(The cases of 372 other parties were consolidated with the principal case.)

The said Robert Thomas Perkins also objected, in like manner, to the several persons whose names are set forth in the list next following; but whose names were retained upon the list of voters, (here followed a list of four names;) and whereas in each of the said cases in the list last above set forth, the validity of the notices of objection depends upon the same point of law as before stated; but in each of the last-mentioned cases it was proved that the person so objected to was entitled to have his name inserted in the list of voters; and whereas it appeared to me that in each of the said cases the said R. T. Perkins had made a groundless objection to the name of the party being retained in the said list of voters; and whereas in each of such last-mentioned cases, I made an order in writing for the payment by the said R. T. Perkins of the costs of the person resisting such objection, and by such order specified the sum to be paid for such costs, and ordered the same sum to be paid on the 2d day of December next; and whereas the said R. T. Perkins is desirous that the said orders for *payment of costs should be suspended until the court have decided upon the subject-matter of the before-mentioned appeal, it is hereby [*133 ordered that the said orders for the payment of costs be suspended,^(a) and abide the event of such appeal, unless the court shall otherwise direct.

(Signed) T. J. A., revising barrister.

M. D. Hill, (with whom was *Wordsworth*,) for the appellant. As a preliminary point, there is no reason why the order for the payment of costs should have been suspended. It seems to be an unnecessary favour shown by the revising barrister to the objector.^(b) [ERLE, J. That point is not raised for our decision.]

(a) The words "such appeal," in the statute, are used solely in connection with appeals from the decision in the case in which the order for the payment of costs is made.

(b) The 6 & 7 Vict. c. 18, s. 46, enacts, "that if in any case it shall appear to any revising barrister, holding any court as aforesaid, that any person shall, under this act, have made or attempted to sustain any groundless or frivolous and vexatious claim or objection, or title to have any name inserted or retained in any list of voters, it shall be lawful for the said barrister, in his discretion, to make such order as he shall think fit, for the payment, by such person, of the costs, or of any part of the costs, of any person or persons in resisting such claim or objection or title; and in every such case the said barrister shall make an order in writing, specifying the sum which he shall order to be paid for such costs, and by and to whom, and when and where the same sum shall be paid, and shall date and sign the said order, and deliver it to the person or persons to whom the said sum shall therein be ordered to be paid: * * *

Provided also, that such order for the payment of costs as aforesaid, may be made in any case, notwithstanding any party shall have given notice of his intention to appeal against any decision of the revising barrister in the same case; but in case of such appeal, the said order for the payment of costs shall be suspended, and shall abide the event of such appeal, unless the court of appeal shall otherwise direct; but no appeal shall be allowed or entertained against, or only in respect of, any such order for the payment of costs."

The objection raised in the case applies equally to the notice to the
 *134] overseers, and to that sent to the party; *but the latter, being the
 most important, will be first considered.

It appears from schedule (A) to the registration act, Nos. 4 (a) and 5, (b) that in the notices of objection in the case of county voters, the objector must specify the nature of the property in respect of which the objection is taken. [CRESSWELL, J. The forms do not point out in respect of what property the objection is taken.] The form of notice to the party (No. 5)
 *135] is *addressed "To Mr. —, of —," leaving a blank after the name; and at any rate, the objector is to mention the name of the parish list, in respect of which the objection is made. There can be no reason why a greater privilege should be conferred upon voters for counties than for boroughs. The form of the notice in the latter case, given in the schedule (B), No. 11, runs thus:—"I object to your name being retained on the list of persons entitled to vote," &c. It is impossible to say what list is intended by such a notice. In point of fact, there is no list of persons *entitled* to vote till the revising barrister has exercised his functions. The notice in this case gives no information. Where a parish is connected with an extra-parochial place—as the parish of St. Dunstan's in the West is with the Temple, in this city—separate lists are made out, one for the parish and another for the extra-parochial place.(c) Separate lists are also made out for each of

(a) Sched. (A), No. 4.

"Notice of objection to be given to the overseers.

"To the overseers of the parish [or 'township,' as the case may be,] of —.

"I hereby give you notice that I object to the name of the person mentioned and described below, being retained in the list of voters for the county [or 'for the — riding, parts,' or 'division of the county,'] of —.

| Christian name and surname of the voter objected to, as described in the list or register. | Place of abode as described. | Nature of qualification as described. | Street, lane, or other like place where the qualifying property is situate, &c., as described in the list or register. |
|--|------------------------------|---------------------------------------|--|
| | | | |

(b) No. 5. "Notice of objection to be given to the parties objected to by any person other than overseers, and to the occupying tenant of the qualifying property.

"To Mr. —, of —,

[Here insert the name and place of abode of the person objected to, as described in the list; and in the case of notice to the tenant of the qualifying property, insert his name and place of abode, as described in the list.]

"Take notice, that I object to your name [in the notice to the tenant, instead of the words 'your name,' insert the name of the person objected to] being retained in the [here insert the name of the parish] list of voters for the county of —, [or 'for the — riding,' &c.]

"Dated this — day of —, 18 .

"(Signed) A. B. of, [place of abode,] on the register of voters for the parish of —."

(c) The 6 & 7 Vict. c. 18, s. 22, enacts, "that every precinct or place, whether extra-parochial or otherwise, which shall have no overseers of the poor, shall, for the purpose of making

the different parishes, which, in London, amount to fifty-one, as appears by the London fire act, 22 Car. 2, c. 11, ss. 62, 63. There are also numerous companies of freemen, in each of which a separate list is made out. "The list," therefore, mentioned in the notice cannot refer to any general list. The seventeenth section of the registration act,^(a) which requires the notices of objection to be given, says that the party may object to any person as not entitled "to have his name inserted in *any* list *of voters for [136 the same city or borough." The words of this section are to be taken distributively; and the same construction is to be put upon the forms in the schedule. If the words in the form were "*any* list," they would give no information; and the adoption of the words "the list" gives no more. The voter has a right to be informed to what list the objection is intended to apply. In the notice to the overseers, the objector necessarily gives the information, at least as to the parish, because the notice is directed to them as "the overseers of the parish of —." But according to the notice given in this case to the party himself, he must be prepared to protect every qualification he may happen to have in the city. [CRESSWELL, J. It will be sufficient if he has one good qualification. ERLE, J. It may be doubted whether there are many voters with such an ubiquity of qualification.] It is quite possible that there may be.^(b) A party may wish to have his name retained for one particular qualification alone which he knows to be good; and that may be the very one intended to be attacked. The form (No. 10) is the first of the forms of notices of objection in boroughs, and the note at the foot of it may be considered as applicable to the following form. In a city or borough, where there is only one list of voters—as where there is only one parish, and there are no voters but 10l. householders—the note will have no application. [TINDAL, C. J. The difficulty which, as you contend, is thrown upon the voter, is that he may not be aware to what parish list the objection applies, and that he may have to hunt over several lists; but by the eighteenth section, the overseers are to *publish [137 a list of persons objected to, and that would inform the party.^(c)] A party is surely not to be compelled to examine the lists on, it may be, ten different church doors. [ERLE, J. That supposes the extreme case of a party having a qualification in ten different parishes.] The question is,

any claim, and making out any list directed by this act, be deemed to be within the parish or township adjoining thereto, and sharing in the right of election to which such claim or list may relate; and if such parish or place shall adjoin two or more parishes or townships situated as aforesaid, it shall be deemed to be within the least populous of such parishes or townships, according to the last census for the time being."

(a) 6 & 7 Vict. c. 18.

(b) It frequently happens that the same person is included in the list of the overseers of several parishes in respect of local qualifications from property occupied by him, and also that his name is inserted in the list of freemen, or of scot and lot voters, or of potwallers, &c.

c) He would have to examine the lists of objection for the parishes in which his name appeared, for the purpose of ascertaining which set of overseers had received notice of objection, but when he had ascertained *what* qualification, or rather the parish in which the qualification or qualifications meant to be attacked was situate, he would be relieved from the necessity of preparing to defend any other qualification.

whether it is not more reasonable that the objector should give the information. [TINDAL, C. J. The question rather is, whether he is required to do so by the act.] By the reform act no notice was required to be given to the party objected to. (a) The legislature has now said that a notice shall be given; and it must have been meant that it should convey reasonable information to the party. [ERLE, J. The notice is to be given "according to the form" in the schedule.] A rigid and superstitious compliance with the form was not intended. The case of *Tudball*, app., and *The Town Clerk of Bristol*, resp., ante, Vol. V. p. 5, shows that the forms may be departed from; and even that a strict compliance with the form may render the notice bad. [TINDAL, C. J. The seventeenth section says, that the notice to the overseers shall be given according to the form No. 10, "or to the like effect," but these words are not repeated in speaking of the form (No. 11) of the notice to the party.] The words "to the like effect" are in case of the objector. The notice in *Tudball*, app., and *The Town Clerk of Bristol*, resp., was held bad, though the words "to the like effect" did not refer to *138] that form. It is very unsafe to rely servilely on forms given in statutes; as is often seen in cases of convictions. In the notice of objection in the case of freemen, under sect. 20, which is to be according to the form No. 4 in schedule (C), the name of the company is mentioned to which the objection applies, so that every requisite information is there given to the party objected to.

As to the notice to the overseers, it must be admitted that the heading is sufficient, as it shows to what parish the objection is pointed; but still, where there are more lists than one, the note applies. And in the city of London, the overseers, where there are extra parochial places like the Temple, have to make out more than one list. (b) [ERLE, J. That is not so stated in the case. We cannot take judicial notice of it.]

Humfrey, (with whom was *Grove*), for the respondent. The whole matter is explained by the 13th section of the registration act. The overseers are thereby required to make out a list of the 10l. householders in their parish, and also another list of all other persons, (except freemen,) who are entitled to vote. In many places there are other voters who are not freemen; as in the city of Westminster, where the old reserved right of voting is in the inhabitant householders paying scot and lot. But in London there are only 10l. householders and freemen who are entitled to vote. The overseers of each parish, therefore, only make out one list. The notice to the party objected to—which was first given by this act—is required to be in a certain form, and that form has been followed. The argument on the other side being entirely *ab inconvenienti*, might properly be addressed to the legislature, but it can have no *139] weight in a court of law. If it were to be adopted, an objector would himself have to

(a) i. e. in cities and boroughs.

(b) The twenty-second section of the registration act (supra, p. 135, n. (a)) does not require overseers to make out separate lists in such a case.

reconstruct the form of the notice given by the act. The note at the foot of No. 10 clearly applies to that form, and not to No. 11. The corresponding forms, Nos. 4 and 5 in schedule (C), which relates to the freemen, are inverted in order; No. 4 being the notice to the parties, and No. 5 the notice to the secondaries, who publish the list of freemen in the same manner that the overseers publish the lists of 10*l.* householders; and a note is appended to No. 5, in schedule (C), similar to that which is appended to No. 10, in schedule (B). [CRESSWELL, J. The note at the foot of No. 10 says, "if the list contains two or more persons intended to be objected to." But it could not be necessary to specify which party was meant in a notice addressed to and served upon the party himself.] It is impossible, therefore, that the whole of the note to No. 10 can apply to No. 11. In *Tudball*, app., and *The Town Clerk of Bristol*, resp., the notice contained an actual misdescription, calculated to mislead the party. That is not shown to have been the case here, nor is it shown that the parties objected to have property elsewhere. Possibly that fact might have made some difference; see *Gadsby*, app., *Warburton*, resp. antè, p. 17. It is contended, that at least the name of the parish ought to be mentioned in the notice to the party. But in the form given, there is no blank in which such a designation could be introduced.

M. D. Hill, in reply. The alteration suggested in the notice might easily be made, if after the words "on the list" the words "for the parish of ——" were added. The 17th section clearly refers to one list out of several. It might be argued that the note to the form No. 5, schedule (C), is unnecessary, as the company to which *the party belongs is mentioned in the body of the notice. This only shows that the whole [140 of the note at the foot of No. 10, in schedule (B), may not be applicable in all cases.

TINDAL, C. J. The question raised in this case is, whether the notices of objection sent by the respondent are sufficiently in compliance with the provisions of the 6 & 7 Vict. c. 18; and it appears to me that the notices are fully sufficient. The difficulty particularly complained of is, that the notice to the party himself does not specify the particular list to which the objection is intended to apply; and that, as a party may have various qualifications within a borough, a notice in the present form would impose upon him the difficulty of examining more than one list. I admit that this is a difficulty which to some extent may be imposed upon the party; and possibly if it had occurred to the legislature they might have framed a form of notice somewhat in the manner that has been suggested. But I think it clear that this is not an objection that can apply to the notice to the overseers in cases where they make out only one list. The notice is sent to the overseers of a particular parish, and it can apply only to a qualification arising out of property situate in that parish. And though there is some difficulty in the case of the notice to the party himself, there does not appear to me to be much. If he has qualifications in different parishes, he

must know in which they are situated. The statute requires that a list of the parties objected to shall be published for two Sundays upon the church doors by the overseers of the parish. And there is no very great hardship imposed on a party who has received a notice of objection, in the first place *141] to make some inquiry of the objector, (a) or *to go himself, or to send some one else, to examine the list of the parties objected to in the parishes in which he may have property.

But the question in this case has not to be determined by any supposed hardship that may arise, but upon the consideration whether or not the notice of objection is in compliance with the act of parliament. It is to be observed, that the notice to the party objected to is required, for the first time, by the registration act. Before that act, no notice was required to be given to the party himself in boroughs. It was sufficient to give a notice to the overseers, the form of which is set out in schedule (1), No. 5, to the reform act. It was probably thought right by the legislature that a borough voter should, in this respect, stand upon the same footing with the county voter, to whom a notice of objection was given under sect. 39 of the former act; (b) and, consequently, the seventeenth section of the registration act (c) *142] requires that a notice shall be given to the party objected to, in a *certain form. Now the notice of objection in this case is in strict and exact conformity with the form No. 11, in schedule (B), which is pointed out by the seventeenth section as the one proper to be followed. And the only ground upon which any argument, founded upon the statute itself is raised, is, that the note at the foot of the form No. 10 is virtually required to be applied to the form No. 11. And it is said, that, inasmuch as where there are several lists made out by the overseers, an objector must state, in his notice to them, to which list his objection applies, so, by analogy, where a party has several qualifications, the objector should state in respect of which of them the objection is taken. But to this argument it is sufficient to answer that it is most clear a court of law has no power to create a rule drawn from any such analogy. And for these reasons: that in the former act, which gives the form of notice to the overseers, there is no such note; that it is given for the first time by the 6 & 7 Vict. c. 18, and

(a) Vide *antè*, p. 20.

(b) The reason for requiring which appears to have been, that a residence in the county being dispensed with by the act of 14 G. 3, c. 58, the voter might not have an opportunity of seeing the overseers' list of objected votes.

Before the 8 H. 6, c. 7, (as to which see 4 Rot. Parl. 359, No. 39,) elections for counties were made in *pleno comitatu*, that is, as generally understood, in the presence and with the concurrence of all men of free condition, who owed suit and service to the county court. Vide 7 H. 4, c. 15; and see the short petition for that act, 3 Rot. Parl. 588, No. 83. As minors were capable of knighthood, and were liable to be summoned to the county court, so they appear to have elected, and to have been elected, without objection, 2 Hatsell's Precedents, 10, until the 8 H. 6, c. 7, restricted the right of election to such residents as had 40s. freeholds; but the 14 G. 3, c. 58, dispenses with the condition of residence. The enormous expense of county elections since the passing of the 14 G. 3, c. 58, does not appear to have been considered, at the time of the reform act, a sufficient reason for putting county voters upon the same footing with borough voters with respect to residence.

(c) *Suprà*, p. 135.

that it is there appended to the form No. 10, and not to the form No. 11. I am therefore of opinion that there is no analogy in the case, and that unless we take upon ourselves not simply to declare the law, but to make it, we have no right to require the objector to adopt a different form from that which has been pointed out by the statute. The decision of the revising barrister must be affirmed.

CRESSWELL, J.(a) I am of the same opinion. The notice of objection in this case given to the party objected to is in the precise terms prescribed by the schedule appended to the seventeenth section of the 6 & 7 Vict. c. 18. It may be laid down as a safe rule, in the construction of acts of parliaments, that we are to look at the words of the act and to render them strictly, *unless manifest absurdity or injustice should result from such a construction. And it is no part of our duty to inquire whether or not this construction is the most beneficial for the party. Undoubtedly, the notice of objection might be so framed as not to put the party objected to to the trouble of casting about to ascertain to what particular qualification the objection was intended to apply. But we must look to the form as it is given, and not speculate upon how it might have been given. The construction we are putting upon the acts, leads to no manifest injustice or absurdity. It is said that some hardship will result from it; and possibly there may be some, but not enough to induce us to depart from the plain words of the act. It has been argued, that a party may choose to rely upon his not having been objected to, as to some particular qualification, and therefore that he may not appear to support his vote. If he does so, he must take the consequences. The notice of objection in this case must be taken to give the party notice that he is objected to as an occupier. He must, therefore, examine the lists in every parish in which he has a qualification as occupier, and as to the hardship of this, a party must do the same in order to ascertain whether his name is on the lists published by the overseers.(b) With regard to some observations that have been made as to the uncertainty of decisions, it is to be observed that the revising barristers act as judicial officers; and from the manner in which the cases in appeals from their decisions have come before us, there is very little reason to suppose that they do not carefully *perform their duty.(c) The case of *Tudball* and *The Town Clerk of Bristol* is no authority here. An objector is bound to describe himself properly. In that case he described himself as being on a list, on which, in point of fact, he was not. [*143]

ERLE, J. I also think the notice of objection was sufficient. The words

(a) Maule, J., was absent.

(b) The objector would have a right to assume that the party to whom he objected had already examined the list of voters for the parishes in which he was qualified, for the purpose of ascertaining that his name was or was not omitted. Upon receiving the notice of objection, he would have to inspect the list of names objected to, for each parish in which his name had been inserted as a voter.

(c) The observations had been made by Mr. Hill in the course of his argument. He afterwards stated he meant them to apply to all tribunals. [*144]

of the act and of the schedule are perfectly clear; but it has been argued that we ought to alter the act, because of some inconvenience that may result from a too strict adherence to it. We ought to use such a power, as that of interpreting acts of parliament in any other but the strict sense of the words, with the greatest scrupulosity; and certainly we cannot exercise it where the law is so clearly expressed as in this case. It has been suggested that a party may have various qualifications as an occupier in the same place. I should think such a case was likely to occur very seldom. (a) The answer to such a supposition has already been given, namely, that the party objected to may apply to the objector for information; (b) probably, however, he would not be bound, and would decline to answer; but even then, it seems that no substantial inconvenience can result to the party. As to bringing the note at the foot of the form No. 10 down to the form No. 11, I think it was clearly not intended that it should be so applied. The note is omitted in both instances of the form of the notice of objection to be given to the party himself. He can have no doubt who is meant by the notice.

Decision affirmed.

(a) In large towns it frequently happens that a party has his house in one parish, and that he is the joint or sole occupier of a counting-house, warehouse, or shop, &c., in another.

(b) Vide *anté*, p. 20.

*145]

*CITY OF LONDON.

GEORGE WANSEY, Appellant; and ROBERT THOMAS PERKINS and Others, Respondents. *Jan. 23.*

(LOCKEY'S CASE.)

A claim to be rated, made under the thirtieth section of the 2 W. 4, c. 45, is good only for the single rate at that time in force.

ROBERT THOMAS PERKINS objected to the name of Richard Lockey being retained in the list of persons entitled to vote in the election of members for the city of London.

The revising barrister decided that Lockey's name ought to be expunged, and thereupon expunged the said name from the said list, subject to the opinion of this court upon the following case:—

The name of the said Richard Lockey was inserted in the list of voters for the parish of St. Michael, Wood street, in respect of the occupation of "a warehouse," 8 Wood street.

The only question raised in the case was, as to the effect of a claim to be rated to the poor-rate, made by Lockey under the following circumstances.

On the 26th of July, 1837, Lockey was the occupier of the said warehouse as tenant, and on or about that day he claimed to be rated to the relief of the poor in respect of the premises so occupied by him, there being 'hen a rate for the time being in the said parish; but there not being any

rate due in respect of such premises, the overseers neglected to put his name on the rate for the time being. Other rates for the relief of the poor were subsequently made in the said parish, between the 26th of July, 1837, and the 31st of July, *1843, and between the said 31st of July, [*146 1843, and the 31st of July, 1844, two rates for the relief of the poor were made in the said parish,—one on the 11th of October, 1843, and one on the 14th of February, 1844. Locky occupied the premises from the said 26th of July, 1837, to the said 31st of July, 1844, inclusive; but he was not rated, in fact, in respect of such premises to any rate for the relief of the poor, made after the said 26th of July, 1837, and he did not make any claim to be rated after the said 26th of July, 1837.

On behalf of Locky it was contended, that, inasmuch as the overseers had neglected to put his name on the rate which was the rate for the time being when he so claimed to be rated as aforesaid, and as he was, by virtue of sect. 30 of the 2 W. 4, c. 45, (a) to be deemed to have been rated to the relief of the poor in respect of the said premises from the period at which the rate had been made in respect of which he had so claimed to be rated, it was not necessary that the claim should be repeated, and that Locky was to be deemed to be rated to all subsequent poor-rates made in the parish, so long as he continued in the occupation of the same premises.

I decided that the operation of the said claim was limited to the rate for the time being when the said claim was so made as aforesaid, and that Locky could not be deemed to be rated in respect of the premises during the time of his occupation thereof required by sect. 27 of the said act.

(Signed)

T. J. A., revising barrister.

Levy Myers duly gave notice to the overseers of the parish of St. Botolph, without Aldgate, in the said city, that he claimed to have his name inserted in the list made by them of persons entitled to vote in the election of members for the city of London; and in his notice of *claim, he stated the particulars of his qualification to be a "house, 3 Stony Lane." [*147

I decided that Myers was not entitled to have his name inserted in the said list of voters, subject to the opinion of this court upon the following case:—

The only question raised was, as to the effect of a claim to be rated to the poor-rate made by the said Levy Myers under the following circumstances.

On the 29th of December, 1842, the said Levy Myers was the occupier of the said house, as tenant, and on that day the said Levy Myers duly claimed to be rated to the relief of the poor in respect of the premises so occupied by him, there being then a rate for the time being in the said last-mentioned parish, but there not being any rate due in respect of such premises. The overseers neglected to put the name of the said Levy Myers on the rate for the time being; other rates for relief of the poor were sub-

sequently made in the said last-mentioned parish between the said 29th of December, 1842, and the 31st of July, 1843. And between the 31st of July, 1843, and the 31st of July, 1844, four rates for the relief of the poor were made in the said last-mentioned parish; that is to say, one on the 31st of August, 1843; one on the 28th of December, 1843; one on the 28th of March, 1844; and one on the 4th of July, 1844. The said Levy Myers occupied the said premises from the said 29th of December, 1842, to the said 31st of July, 1844, inclusive; but he was not rated in fact in respect of such premises to any rate for the relief of the poor made after the said 29th of December, 1842. And he did not make any claim to be rated after the said 29th of December, 1842.

The validity of the objection to Myers's claim to be inserted in the list of voters depended, and was decided by me, upon the same point of law as that upon which the validity of the objection in Lockey's case depended, *148] *and was decided; and I directed the two cases to be consolidated. (Signed) T. J. A., revising barrister.

The validity of the claims and objections determined by me in the cases of the respective parties whose names are hereafter next set forth, depended and were decided by me upon the same point of law as that upon which the validity of the objection in the before-mentioned case of Richard Lockey depended and was decided; except in so far as in each of the cases of the said last-mentioned parties, the claim to be rated was made respectively after the 31st of July, 1843; and it was contended before me on behalf of each of the parties, that as the claim to be rated in each of the last-mentioned cases was made after the 31st of July, 1843, each of such claims was operative to put the party making the claim, upon the rates made after such claim and before the 31st of July, 1844; and I decided, as to the operation of the said claim, in the same manner as I had previously decided in the case of the said Richard Lockey; and as this court might be of opinion that there was a difference in this respect between a claim to be rated made before the 31st of July, 1843, and a similar claim made after that date; to enable the court to decide upon such point if the court should so think fit, the dates between the 31st of July, 1843, and 31st of July, 1844, when the poor-rates were made in the respective parishes in which the premises were situated, in respect of which the parties were either inserted in the list of voters, or claimed to be so inserted, are set forth under each parish, and the date of the claim to be rated made by each party is also respectively set down against his name.

(Then followed a list of the names of ten parties objected to and of two claimants in different parishes, with the dates of the poor-rates made therein *149] between the *31st of July, 1843, and 31st July, 1844, and the dates of their claims to be rated.) And as in the cases of the claimants, there was no party in whose favour the decision appealed against had been given, the overseers of the parish, in the list whereof the said parties respectively claimed to have their names inserted, were named to be the

respondents jointly with the said Robert Thomas Perkins in the consolidated appeals
(Signed) T. J. A., revising barrister.

M. D. Hill, (with whom was *Wordsworth*,) for the appellant. The thirtieth section of the reform act confers a statutory power upon the overseers to alter the poor-rate by the insertion of the names of parties who have claimed to be rated. If the claim be complied with, its effect is coincident with the continuation of the party's occupation. If it be not complied with, the claimant ought not to be damnified by the neglect of overseers. There can be no reason why a claim should be operative for two or three rates and not for more. [TINDAL, C. J. How does it appear that it is operative for two or three rates? The question appears to be, whether it is good for more than the rate in force *at the time* when the claim is made.] The words of the section are express, that if, after a claim to be rated, the overseers neglect or refuse to put a party on the rate, he "shall nevertheless, for the purposes of this act, be deemed to have been rated to the relief of the poor in respect of such premises *from the period* at which the rate shall have been made, &c." [TINDAL, C. J. You construe that to mean—from that period for ever after?] At least so long as he continues in the occupation of the premises. [ERLE, J. Suppose the overseers put his name on, and afterwards omit it. TINDAL, C. J. The party is not only to claim, but also to tender and pay the rate, if due.] The case finds that no rate was due at the time *of the respective claims to be rated. [CRESSWELL, J. [*150 You say that the *terminus a quo* of the rating is given, but not the *terminus ad quem*. It is to be observed that the words are "shall be deemed to have been rated," not "to be rated."] It was necessary to give the *terminus a quo*: the absence of the *terminus ad quem* shows that no prospective limits to the effect of the claim were contemplated. It cannot be meant that the claim is to be repeated every time a fresh rate is made. [TINDAL, C. J. Why should it not be? The payment of the rate is to be made every time. If one claim were sufficient, the party could not be required to pay the subsequent rates, and he might keep them in his pocket. One set of overseers would go out, and their successors would not know what had been done. It is something like the ancient practice of preserving a right by continual claim. There seems nothing in the objection.] *Humfrey*, (with whom was *Grove*,) for the respondents, was not called upon.

Per curiam;

Decision affirmed, with costs.(a)

(a) And see Mann. Proc. in Courts of Revision, 50, 92.

*151]

*CITY OF LONDON.

GEORGE WANSEY, Appellant ; and ROBERT THOMAS PERKINS,
Respondent. Jan. 23.

(HILL'S CASE.)

The occupier of a floor in a house, in which the landlord himself resides, is a mere lodger. and not entitled to be registered as a voter, although he has a key to the outer door.

CASE. James Hill duly gave notice to the overseers of the parish of Saint John the Baptist, that he claimed to have his name inserted in the list made by them of persons entitled to vote in the election of members for the city of London ; and, in his notice of claim, he stated the particulars of his qualification to be "Three Rooms, 16 Budge Row."

I decided that Hill was not entitled to have his name inserted in the said list of voters, subject to the opinion of the court upon the following case :—

Thé claimant occupied the whole of the second floor in a house No. 16 Budge Row. The floor consisted of three rooms, which were in the exclusive occupation of the said claimant, and were occupied by him as a dwelling-place and a printing-office. He occupied the rooms in question as tenant to one Knight, who occupied the shop and first floor in the house, and who resided therein. The outer or street door of the house was kept closed, and Knight had a key thereto, as also had the claimant.

No question was raised in the case, except as to the sufficiency of the qualification.

(Signed) T. J. A., revising barrister.

(The cases of four other claimants, and one party objected to, were consolidated with the above case.)(a)

*152] *M. D. Hill, (with whom was Wordsworth,) for the appellant.

This case may be distinguished from *Pitts*, app., and *Smedley*, resp., antè, 85, as here the claimant had the perfect and exclusive occupation of the three rooms ; and they would constitute a sufficient building within the principle of *Wright*, app., and *The Town of Stockport*, resp., antè, Vol. V. p. 33. It may be presumed that the claimant had the key of his own apartments. Generally speaking, a landlord is not precluded from going into all the rooms in his house, in order to look after the fire and lights ; but he could not do so in the present instance. The claimant had also the key to the outer door ; and it must be inferred that it was part of the original contract that he should have it. This case consequently does not differ from one where there is no outer door, as in the case of chambers. If an outer door were affixed to a building occupied as chambers, that would not deprive the occupiers of their franchise. In one of the consolidated cases in this appeal, a party claims

(a) The nature of the qualification of one of the claimants was stated to be, "Chambers, 12 King's Bench Walk."

in respect of chambers in the Temple ; so that it would appear, the revising barrister decided that even the occupation of such chambers would not confer a franchise. [ERLE, J. Taking that claim in conjunction with the statement in the case, I think it must mean, that the owner of the chambers had underlet a room or two to the claimant.] The fact of there being an outer door in the present case can be of no importance. If it were a swing door, it would clearly make no difference ; and the fastenings can make none, as the claimant has a right to open them. The principle for deciding cases like the present should be, that where a party has the exclusive possession of a room of the requisite value, and the constant right of access thereto, he is entitled to the franchise. For many purposes, the criterion *in burglary may be applicable to election cases, but not for all. [153 The occupier of a part of a house is protected, whether the house is described in an indictment as his own house, or as that of his landlord. [CRESWELL, J. Your argument is, that the landlord was not the occupier of the whole house.] He could not be the occupier of the whole, inasmuch as the rooms in question were clearly in the exclusive occupation of another party.

Humfrey, (with whom was *Grove*,) for the respondent. The case is defective in not containing any statement as to the value of the rooms ; the value is part of the "sufficiency of the qualification," as to which it is stated the question was raised. The case will probably have to be remitted to the revising barrister. [TINDAL, C. J. As I understand the statement, it means that the *only* question was, whether the *occupation* was sufficient.] The claimant cannot be said to have had the exclusive occupation of the rooms as against his landlord. It is not stated that he had the key of the outer door by the terms of the original contract : it was probably only a permissive right he exercised. In the *Case of Joint Occupiers*, Alcock, Reg. Ca. 2, the Irish judges held that two persons, not joint-tenants, occupying different parts of the same house, each part being of the clear yearly value of 10*l.*, could not be permitted to register. [ERLE, J. The Irish reform act contains no provision as to joint-tenants.] Where the owner of a house occupies part of it, and underlets the rest, his tenant is always considered as a *lodger*, and as having no right to vote. In *Fludier v. Lombe*, Ca. temp. Hardw. 307, the question was, as to the right of certain persons to vote as *householders*, in corporate elections for the city of London, (under the stat. 11 G. 1, c. 18,) and [154 *Lord Hardwicke said :—" To be sure the letting lodgings does not at all diminish the true yearly value of the house ; then, does the taking in inmates make a man cease to be in the occupation of it ? I have no notion that it does : for no man can be occupier of a house, but either by living in one of his own, or one that he hires ; a lodger was never considered by any one as the occupier of a house : no part of it can be said to be in his tenure or occupation ; and though he pay rates, yet will he not have the power to vote, not being deemed to be a *householder* or *occupier*. A

lodger cannot be said to be an inhabitant, but an inmate under the tenant.” [CRESSWELL, J. There is no statement in this case, that the three rooms communicated with each other. If they did not, but opened into the same staircase, it might be argued, supposing the occupation to be sufficient, that they were three separate buildings; and then it might be a question whether they could be joined together.(a)] The proper test is, whether a party can go from one part of his premises to another part, without going upon the premises of another person. That was the point in the *Stockport* case; which is very distinguishable from the present.

M. D. Hill, in reply. The landlord and tenant in this case are both upon the same footing. The second floor, occupied by the claimant, is as much a separate house as a set of chambers. There is no reason to suppose that the three rooms were so separated as to constitute three distinct buildings. The *Stockport* case is a strong authority for the appellant. In that case there was an outer door, which was not locked: here, although the outer door is locked, it is not so as against the claimant. It would be *155] dangerous to act upon a *supposed analogy derived from cases of burglary. The doctrine in settlement cases proceeded upon the same principle, treating the owner of the house as the *pater-familias*. That principle was drawn from the doctrine relating to burglary, in which case the leaning would be *in favorem vitæ*; as here it ought to be in favour of the franchise. The fact of the landlord residing, or of his not residing, in the house, introduces no essential distinction. There is no reason why the franchise of the tenant should depend upon the circumstance of the landlord's choosing or not choosing to reside on the premises.

TINDAL, C. J. If the premises in the occupation of this claimant were so completely divided from the rest of the house that the landlord had given up all control over them, the case would have been different. But here, the landlord lets the claimant into the possession of the second floor, the landlord himself retaining the possession of the rest of the house. This puts the claimant in the condition of a lodger or inmate. The relative position of such a party to the owner is well known. In this case the landlord remains the occupier of the house; and the claimant, who is a lodger, is not within the contemplation of the act.

CRESSWELL, J. The court has already given its opinion upon this point in the case of *Pitts*, app.; *Smedley*, resp.

ERLE, J. The distinction is pointed out in *Fenn v. Grafton*, 2 N. C. 617, and *Monks v. Dykes*, 4 M. & W. 567. His lordship also referred to *Kearney's* case, Alcock, Reg. Ca. 22.

Decision affirmed, with costs.

(a) That they could not, *vide post*, 182.

*CITY OF LONDON.

[*156]

BAGE, Appellant ; PERKINS, Respondent. Jan. 23.

Where the respondent appears, but the appellant does not, the decision of the revising barrister will be affirmed with costs, unless it appear that a similar point is involved in another case standing for argument.

In a case where it was suggested that such a similarity did exist, the court suspended its judgment.

Humfrey, for the respondent, no one appearing for the appellant, prayed that the decision might be affirmed.(a)

Kinglake, Serjt., *amicus curiæ*, suggested that the point raised in this case was involved in another case which then stood for argument ; and the court proposed therefore to suspend their judgment. But it afterwards appearing that the suggestion was incorrect,

Per Curiam ; Decision affirmed, with costs.(b)

(a) As to the course to be pursued where the appellant appears, but the respondent does not, *vide ante*, p. 97.

(b) BOROUGH OF LAMBETH.

CROCKER, Appellant, and The Overseers of ST. MARY, LAMBETH, Respondents.

In this case, which came on at a later period in the same day, the appellant not appearing, the court, on the application of Arnold, for the respondents, affirmed the decision, with costs.

*BOROUGH OF TAUNTON.

[*157]

JOHN ALLEN and Others, Appellants ; THOMAS HOUSE, Respondent. Jan. 23.

In a borough where the overseers had to make out two lists, one being of parties entitled to vote under the 2 W. 4, c. 45, s. 27, the other of potwallers:—*Held*, that a notice of objection to the name of a party being retained “on the list of persons entitled to vote as householders,” was sufficient ; although the words “as householders” are not in the form given by the 6 & 7 Vict. c. 18.

Where only one side is heard, the successful party is entitled to costs.

CASE. Subject to the condition of registration, the right of voting for members for the borough of Taunton is only in the occupiers of property by virtue of the statute 2 W. 4, c. 45, and in certain persons within a part (a) of the parish of St. Mary Magdalen, qualified, according to the usage of the borough, as potwallers.(b) A potwaller, according to such usage, is considered to be “one, whether he be a householder or lodger, who has the sole dominion over a room with a fire-place in it, and who furnishes and cooks his own diet at his own fire-place, or at some other

(a) Namely, that part of the parish which is situated within the limits of the ancient borough.

(b) The usage also requires that the voter shall be settled in the parish of Taunton St. Mary Magdalen.

place within the same house, at which fire-place he has a legal right so to do, and who has actually cooked his diet at such fire-place.”

At the court of revision the overseers of the parish of St. Mary Magdalen produced a list which had been duly made out and published, according to the form No. 3, prescribed in schedule (B) annexed to the act of 6 & 7 Vict. c. 18, of persons entitled to vote in respect of property occupied by virtue of the 2 W. 4, c. 45, and *another list which had been duly made out and published, of persons entitled to vote in respect of rights other than those conferred by the last-mentioned statute. In the latter list, the names, places of abode, and qualifications of the voters, were inserted, and the nature of the qualification was described by the words “a potwaller.”

In the list of objections, Allen’s name was entered as follows :

| Name. | Place of abode. | Nature of qualification. | Property where situate, &c. |
|--------------|-----------------|--------------------------|-----------------------------|
| Allen, John. | East Street. | Dwelling-house. | East Street. |

His name was not on the potwallers’ list, nor had he claimed, nor was he entitled, to be inserted in that list, or in the list of voters for any other parish within the borough. Thomas House, a person on the list of voters for the borough, appeared at the court of revision, as an objector to the name of the appellant. It was proved that he had given the proper notice of objection to the overseers, who had duly published it, and that he had given, before the 25th day of August, a notice in the form following to the appellant :—

“ To Mr. John Allen of East Street, south side.

‘ I hereby give you notice that I object to your name being retained on the list of persons entitled to vote, *as householders*, in the election of members for the borough of Taunton. Dated, this twenty-third day of August, one thousand eight hundred and forty-four.

“ Thomas House, of Silver Street, Taunton, on the list of voters for the parish of St. Mary Magdalen as a potwaller, and described therein as residing in Victoria Place.”

*159] “The words “ *as householders*” were an interlineation. It was contended on the part of the appellant, that as there was no list of householders, as such, made out in the borough, the notice was vitiated by the introduction of the words “ *as householders*.” On the contrary, it was said for the objector, that these words were introduced to distinguish the list of occupiers, in which the name of the appellant appeared in respect of a dwelling-house from the list of potwallers in which his name did not appear at all. I held the notice sufficient, and required it to be proved that the appellant so objected to was entitled, on the last day of July, then next preceding, to have his name inserted in the list of voters in respect of the

qualification described in such list. The qualification was not proved, and the name of the appellant was expunged from the list.

The cases of twenty other parties were consolidated with the principal case.

The question for this court is, whether the notice given by the objector to the appellants was sufficient? If it was, the register is to remain unaltered; if it was not, the names of the several appellants are to be added to it in respect of the qualifications described below.

(A list of the names of the other parties with their respective qualifications was added.) (Signed) C. S., revising barrister.

Prefixed to the case was an introductory statement, in which all the facts stated in the case itself were recapitulated. It also stated that the notices to the overseers were all worded in a similar manner as the notices to the parties; and the manner in which the objection was taken was stated as follows:—

An objection was taken to the preceding notices; and it was contended before me, on the parts of the several appellants, that the notices were bad in point of form, and not sufficient to put the appellants on the defence *of their franchise, inasmuch as the notices did not point out, with [160 sufficient certainty, to which of the two lists of electors they referred, as they ought to have done, in order that the party objected to might know to which of the two qualifications the objections applied, and the nature of the defence they should have recourse to in order to substantiate their right; and also that the objector was bound by section 17, of the 6 & 7 Vict. c. 18, to frame his notices to the parties in the precise words of the form numbered 11, in schedule (B.)

Kinglake, Serjt., for the appellant. The difference between this case and *Quigley's* case, *anté*, p. 127, is, that in this borough the overseers have to make out two distinct lists of voters. [CRESSWELL, J. I presume the objection is, that the objector gave notice which referred not to a wrong list, but to a non-existing list; as, strictly speaking, there is no list of *householders*.] The objector has not complied with the form given by the statute. He has referred to a list by a term which is dubious, uncertain, and ambiguous in its meaning. It may be said that the term *householder*, in its popular sense, is the same as—occupier of a house; but it is not the occupation of a *house* alone that confers the franchise. And the term *householders* is as applicable to potwallers as to parties having the new franchise under the twenty-seventh section of the reform act. [ERLE, J. This notice has every word in it which is contained in the form No. 11, in schedule (B) to the 6 & 7 Vict. c. 18.] But it has something in addition.^(a) The objector has taken upon himself to *describe* the list in which the name of the party objected to was inserted; and the court held, in *Quigley's* case, that he was not required to do so. [ERLE, J. Suppose he had said, “I object to your name being retained *on the list of persons entitled to vote as free and independent electors.”] In case [161

(a) Vide *anté*, p. 20.

161 WANSEY, App. ST. PETER LE POOR, Resp. H. T. 1845.

the objector had specified a wrong list, the notice would clearly have been insufficient. [CRESSWELL, J. If the objector had described himself as on the list of householders, the notice would certainly have been wrong. You say it is equally wrong in describing the party objected to as being on that list.] Upon the ground that in fact there is no such list.

Cockburn, for the respondents, was not called upon.

TINDAL, C. J. It appears to me that this is, substantially, a good notice, although the words "as householders" are inserted. If the insertion of those words *could* have misled the party objected to, then the notice, not being in strict compliance with the form given in the act, would have been bad. If the form had been exactly followed it would have merely said, "I object to your name being retained on the list of persons entitled to vote in the election of members," &c. Here the objector has stated every word that is given in the form, and has inserted some that are not there. I think however that the principle *utile per inutile non vitiatur* applies, it not being shown that the party was misled, or that he was put to any inconvenience or extra expense. In common parlance, the list in question *was* made out in respect of 10*l.* householders.

CRESSWELL, J. If the departure from the prescribed form had been likely to divert the attention of the party to a wrong list, I think the notice would have been bad. But this notice could not possibly have that effect.

ERLE, J., concurred.

*162] **Cockburn*, for the respondents, applied for the costs.

TINDAL, C. J. Where we hear only one side, the successful party ought to have his costs. Decision affirmed, with costs.

CITY OF LONDON.

WANSEY, Appellant; and the Overseers of ST. PETER LE POOR,
Respondents. Jan. 23.

Where neither party appears, the case will be struck out, and the court will not, without sufficient reason being shown, restore it to the paper.

WHEN this case was called on, no one appearing on either side, it was ordered by the court to be struck out.

Wordsworth, for the appellant, on a subsequent day, (Monday the 27th January,) applied to have the case restored. No one appeared for the respondents, but the court refused the application, no sufficient reason being given for the non-appearance of the parties when the case was called on: and the learned counsel Took nothing.

*BOROUGH OF WENLOCK.

[*163

JOHN HINTON, Appellant; HUMPHREY HINTON, Town Clerk of WENLOCK, Respondent. Jan 23.

Whether the name subscribed to a notice of objection is so subscribed as to be commonly understood to be the same as that by which the objector is designated in the list of voters, is a question not of law, but of fact.

CASE. The name of Henry Cooper was expunged from the list of persons entitled to vote in the parish of Much Wenlock in the borough of Wenlock.

A person whose name was proved to be William Nicholas objected to Cooper's name being retained on the list. The notice of objection was signed "William Nicholas of Colebrook Dale, in the parish of Madeley, on the list of voters for the parish of Madeley."

Madeley is a suffragan parish of the borough of Wenlock.

The notice was in all respects regular, and in conformity with the form prescribed by the 6 & 7 Vict. c. 18. The validity of the notice turned upon the question whether the objector was entitled to object at all, and, if so, whether his signature was sufficient.

The name in the list was William Nickless. The name of "William Nicholas," sent by the objector, was on the list of claimants on the church door. Nickless was intended for the objector's name by the overseer, and Nicholas, the objector, was the identical person whose name was written William Nickless in the list. The mistake had been committed in the lists of the preceding years. In 1843 William Nicholas applied to the revising barrister to correct the mistake. The revising barrister made the correction, and inserted the name, properly spelt, in the list of voters. The overseer of Madeley swore that the repetition of the error was owing *exclusively to his own negligence. I held the notice valid, and the [*164 case of the objector being established, I expunged Cooper's name, which, if this court are of a different opinion, is to be restored. (The cases of thirteen other parties were consolidated with the principal case.)

(Signed) J. G. P., revising barrister.

Keating, for the appellant. The mistake in the name of the objector was calculated to mislead the party objected to, and the case therefore falls within the principle of *Tudball*, app., and *The Town Clerk of Bristol*, resp., ante, Vol. V. p. 6. The objector's name was not upon the list of voters required to be published according to the regulations of the thirteenth section of the registration act. [TINDAL, C. J. One question, may be, is, whether the name of the objector is not *idem sonans* with that published in the list.] It is possible that there might be two parties of these two different names in the same parish. [CRESSWELL, J. It appears that the name in the list of voters was intended for that of the objector.] The voter ought not to be

affected by the *intention* of the overseer. The right name was inserted in the list of claimants, which is an admission on the part of the objector that his name was not properly on the list of voters. Suppose the notice had been signed by a party of the name of Cholmondeley, and the name on the list of voters was Chumley, surely the notice would not have been sufficient. [CRESSWELL, J. Suppose an objector's name was Thompson, and his name in the list was spelt Thomson, would not the notice have been sufficient?] It is submitted that it would not, any more than if there were two parties in a borough, one of the name of Smith and the other of Smyth. If the former name was put on the list by mistake for the latter, a notice signed by *the latter would not be sufficient. It is not a question *165] as to the name being *idem sonans*. [ERLE, J. What greater hardship can it be upon a voter to be called upon to prove his qualification by a party of the name of Nicholas than by a party of the name of Nickless?] The question is, whether he was bound to prove his qualification at all.

Gray, for the respondent. This is a question of fact, and not of law; and it has been so argued on the other side. It falls, therefore, within that part of the interpretation clause of the registration act, which enacts, that "no misnomer or inaccurate description of any person, &c., in any notice, &c., shall abridge the operation of the act with respect to such person, provided that such person shall be so denominated in such notice as to be commonly understood." [CRESSWELL, J. Upon that point, the revising barrister has either decided the fact, or stated something which he could not properly submit to us.] In cases from sessions, the court of Queen's Bench will not give any opinion as to whether the justices have come to a wrong conclusion of fact. Even if this would be treated as a question of law, it would be a mere inaccuracy in the name of the objector, but not such as to prevent the name being commonly understood.

Keating, in reply. This is not more a question of fact than the residence of a party, which the court have entertained. In cases from sessions, the court of Queen's Bench would decide whether a building was a tenement, or a pauper had gained a settlement. The question here is, whether, under the provisions of the statute, the objector is in a situation to object. Overseers cannot insert a name in a list of claimants, unless they receive a notice of claim.

*166] *TINDAL, C. J. I think the answer given on the part of the respondent is conclusive. The question is one of fact, and not of law. If it had appeared that there had been an important variance between the name of the party as subscribed to the notice, and that published in the list, the question might have assumed a different aspect. Here the only difference between the two names is, that one is wrongly spelt, and that is a defect which is helped by the interpretation clause; which provides that no misnomer shall prevent the operation of the act in case the name can be commonly understood. Whether it can be so or not in the present case, is not a question of law, but of fact. As far as we can infer from the fact

of the revising barrister having held the notice sufficient, he must have thought that the name could be commonly understood.

CRESSWELL and ERLE, Js., concurring, Decision affirmed. (a)

(a) The court will not remit a case to the revising barrister for the insertion of a fact which the barrister considered to be immaterial.

Keating had moved, (6th November,) under the 6 & 7 Vict. c. 18, s. 65, for a rule calling upon the respondent to show cause why this case should not be remitted, in order that a certain statement might be added,—upon an affidavit that a fact had been proved, which the appellant considered to be material, but which the barrister had refused to insert, considering it to be immaterial.

TINDAL, C. J. By sect. 42, the barrister is to state the facts which, in his judgment, are material. We have no authority to do that which is asked. The power of remitting the case, under sect. 65, exists only where the statement is not sufficient to enable the court to give judgment. That is not the ground of the present application.

Per curiam;

Rule refused.

*CITY OF BRISTOL.

[*167

JAMES DANIEL, Appellant; WILLIAM CAMPLIN, Respondent.

Jan. 20.

In a case of joint occupation of a house in a borough, it is not necessary that such joint occupation should be stated in the overseers' list of persons entitled to vote in respect of property in boroughs.

Quære, whether it should be stated in a claim sent in by a party whose name has been omitted, or the nature of whose qualification has been improperly described.

CASE. James Daniel objected to the name of William Camplin being retained upon the householders' list of voters in the parish of All Saints.

The name was thus inserted in the list.

| | | | |
|-------------------|--------------|------------------------|--------------|
| Camplin, William. | High Street. | House and Shop. (a) | High Street. |
|-------------------|--------------|------------------------|--------------|

William Camplin occupied the house and shop which conferred his qualification, jointly with another person. The premises were of sufficient value; and all the other requisites necessary to give Camplin a vote had been complied with; and the only objection was, that the qualification stated upon the list should not have been "house and shop" merely, but ought to have been "the joint occupation of a house and shop."

*It was contended, on the other hand, that the words "house and shop" sufficiently described the qualification; but, if not, I was requested, under the powers given to me by the fortieth section of the regis- [*168

(a) If the shop, as was probably the case, was part of the house, there would appear to be a misdescription. The "shop" qualification evidently refers to a shop occupied distinctly from the house. But this is not an objection *ex facie*, as a party may occupy a house and, at the same time, a separate shop, each of the yearly value of 10*l*. To such a title to registration there would be no more objection than to a title in respect of two or several houses, each (post, 82) being of the requisite value. In the case, however, of an objection, the proper decision would appear to be that the objection was sustained as to one alleged qualification, namely, the shop, and that it failed as to the house. This would appear to be a more correct course, than to hold that it was the same right to registration *vis petitionum*, requiring merely a formal amendment.

tration act, (a) to insert such words as would make it appear that the occupation was joint.

I decided that the qualification as stated upon the list was sufficient, and retained the name of William Camplin.

(Signed) J. T., revising barrister.

(The case then stated that a similar objection had been raised to the retention of the names of 120 others, all of which cases were consolidated with the principal case.)

If this court are of opinion that the several qualifications were sufficiently stated upon the lists, or that I ought, in each case, to have inserted a statement that the premises were occupied jointly, then the names are to remain upon the register.

But if the court are of opinion, that the fact of a joint occupation ought to have appeared as an ingredient in the several qualifications stated upon the lists, and that I had no power to insert the addition which was suggested, then these 121 names are to be expunged from the register.

(Signed) J. T., revising barrister.

Kinglake, Serjt., for the appellant. This being a case of joint occupation, it should have been so stated on the face of the list; the party should have been described either as jointly occupying a house and shop, or as occupying part of a house. [MAULE, J. What part should he be described as occupying?] He might have been described as occupying an undivided moiety. The occupation contemplated by the twenty-seventh section *169] *of the 2 W. 4, c. 45, is clearly that of a *sole* occupier for twelve months. The twenty-eighth section confers the franchise in the case of successive occupation of different premises within that period; and then the twenty-ninth section enacts, "that where any premises shall be jointly occupied by more persons than one as owners or tenants, each of such occupiers shall be entitled to vote in respect of the premises so jointly occupied, in case the clear yearly value of such premises shall be of an amount, which, when divided by the number of such occupiers, shall give a sum of not less than 10*l.* for each occupier." If the two latter cases had not been provided for, a party, in order to be entitled to the franchise, must have been the sole occupier of one set of premises for the requisite period. In the Irish reform act (b) there are no sections analogous to the twenty-eighth and twenty-ninth in the English act; and the Irish judges, consequently, have held that in Ireland joint occupiers are not entitled to be registered as householders; *The case of Joint Occupiers*, Alcock Reg. Ca. 2. In *Bartlett*, app. and *Gibbs*, resp., ante, Vol. V. p. 81, this court held that in a case of successive occupation under the twenty-eighth section of the English reform act, a party ought to be registered in respect of *all* the premises occupied in succession. [MAULE, J. That case was decided upon the ground that a full statement of all the qualification was necessary, to

able an objecting party to see whether it was sufficient.] The same observation is applicable here. An objector might be deceived as to the value of the premises, if he supposed them in the sole occupation of one party. [MAULE, J. You would contend that where a party occupies jointly with four others, the premises ought to be designated as "one fifth of a house.""] They should be described either in that or *some similar manner. This has been considered to be necessary with respect to [*170 the claim sent in by a county voter. See the appendix of forms given in Elliott on Registration, page 619, 2d edit. The schedules to the reform act are filled up with certain examples of what is to be inserted, but the schedules to the registration act are left blank. By the seventy-third section of the latter act, provisions have been made as to the 50*l.* tenants in counties similar to those contained in the reform act with respect to successive and joint occupation in boroughs. [TINDAL, C. J. That would rather have the effect of making every joint occupier a several occupier. How was it at common law, before the reform act, in the case of freeholders? If there were several-joint tenants, each was entitled to vote as a separate tenant.](a) The value of the premises is the very essence of the franchise in boroughs; and such information ought to be given in the list, that a party might easily ascertain whether the premises in respect of which a voter's name was inserted, were of the proper value. The qualification of the party objected to is stated to be a house and shop, but in fact he only occupied part of them. [MAULE, J. Your argument should rather be that he only partly occupied them. TINDAL, C. J. He cannot be said to be occupier of part of a house, when he is joint-tenant of the whole.] It may be said that he occupies one half for himself, and the other half as bailiff for the other joint-tenant.(b) In *Rex v. The Inhabitants of Great Wakering*, 5 B. & Ad. 971, 3 N. & M. 47. (c) A., by indenture, demised a house and land to B. and C. for *a term of years at 16*l.* per annum. There was a [*171 covenant by them, jointly and severally, to pay taxes and rates, &c., but none to pay rent. B. occupied the whole, and paid the rent for five years: it was held that the demise being joint, the rent was payable by the two jointly, and that each could only be considered as having rented a tenement at 8*l.* a year, and, consequently, that B. did not gain a settlement, either by renting the tenement or by being rated, and paying rates, in respect of it. In *Rex v. The Inhabitants of Tunbridge*, 6 B. & C. 88, 9 D. & R. 128, a pauper held a house at the annual rent of 8*l.*, from Lady-day to Michaelmas, 1821, and a different house from Michaelmas, 1821, to Lady-day, 1822, at the annual rent of 9*l.*; and during the whole of that period, he was the tenant of a garden at an annual rent of two guineas; but he had agreed

(a) The question would then have been, whether the voter had lands or tenements of the value of 40*s.* per annum, above reprises, and whether his freehold enabled him to spend to that amount.

(b) That would be a proper mode of describing a sole occupation under a joint ownership.

(c) And see *Rex v. Marden*, Burr. Sett. Cases, p. 311, Sayer, 9.

with another person that they should share the expense and the profits arising from the cultivation of the garden, and that person paid him half the rent, but he paid the whole to the landlord; it was held, that he did not gain a settlement, because he did not, during the whole year, as required by the 59 G. 3, c. 50, hold a house and occupy land which together were of the annual value of 10*l*. From these cases it appears that a joint-tenant is not considered, for all purposes, as interested in the whole of the property.

As to the power of the revising barrister to make the suggested amendment, that will depend upon the question, whether the joint occupation is a material part of the qualification. [TINDAL, C. J. The barrister may alter the *description* of the premises. Would not this be mere matter of description? It would not be altering the nature of the qualification, as in the case of inserting a different property. CRESSWELL, J. Suppose in the list *172] a qualification was stated to be a "house," and it *turned out to be a "warehouse;" (a) might not the barrister alter that description? (b)

Bull, for the respondent. No other description than that which has been given in this case is required by the schedules, either of the reform or the registration act. It has been assumed in the argument on the other side, that the party has a separate interest in the whole property. The form given in the appendix to Elliott is only suggested in the case of tenants in common. All that is required to be stated is, the *nature* of the qualification, not the *particulars* of it, such as the value, the length of occupation, the rating, &c.; those are matters of evidence before the revising barrister. A party might not even know who were the other joint-tenants(c) or tenants in common *173] with himself. *[TINDAL, C. J. It is not contended that the amount of the interest of the party is to be inserted, but that, *primâ facie*, a joint-tenant should not appear as *sole* owner or occupier.](d) If the

(a) *Quære*, whether such an alteration would be the correction of an insufficient description of the nature of the qualification for the purpose of being identified, which the barrister is empowered to make, or the substitution of another qualification, which he is expressly restricted from making. If the party were represented in the list of voters to be qualified in respect of a house, the objector would not be prepared to meet the case of one of the rooms of that house being used as a warehouse; and *e contra*, if the party whose qualification is stated to be a warehouse had claimed to be qualified in respect of the house in which that warehouse is situate, the objector might have brought evidence to show, that the owner of the house resided there, and had exclusive possession of the key of the outer door—evidence which, as the qualification stood, would be wholly irrelevant.

(b) Vide *Daniel*, app.; *Coulsting*, resp., antè, p. 122.

(c) With respect to occupation, and the right to occupy, there is no difference between tenants in common and joint-tenants. In either case, each of the two or more tenants is said to hold the whole and nothing, *nihil habet et totum habet*, or, in the legal phrase, he is seised *per my et par tout*, an expression which some modern writers, by a singular infelicity of translation, have rendered "seised by the half or moiety, or by the whole," 2 Bla. Com. 182, as if "my" were derived from the French "mi" instead of "mie."

"Biaux chires (beaux aires) lous n'écoutez mie

"Femme qui tance son enfant qui crie."

(d) To a plea alleging that A. was seised of a manor, a replication that B. was seised jointly with A. is bad, if it do not traverse the seisin of A.; inasmuch as the alleged seisin must be

amount of the interest were not mentioned, no information would be given. [TINDAL, C. J. At any rate it might set people on inquiry.] The rate-book is the only means the overseers have of obtaining any information on the subject. [CRESSWELL, J. If the description in the list is wrong, the party may send in a claim. This brings it back to the fact of the description in the list being adopted by the voter, it being the same thing as if he had claimed by that description.] In schedule (I), No. 1, to the reform act, there is no column in which the statements as to *joint* occupation could be inserted. In the column headed "nature of qualification," the instances given are "house," "warehouse," &c. In the corresponding schedule (B), No. 3, to the registration act, there is a column headed in the same way. No examples are there given; but it is to be presumed, that the blank is to be filled up in the same manner as in the form in the reform act; there being no difference, in this respect, between the wording of the sections in the two acts; both of which require that in the list shall be stated the name of the party entitled to vote, and "the nature of the qualification." [CRESSWELL, J. The nature of the qualification in this respect is the same in all cases, namely, the occupation of certain property; that appears from the heading of the list. Is it not then the same as if the column in question were headed "nature of property occupied?"] The occupation by one tenant in common is the occupation of all. [MAULE, J. Suppose there are *two joint occupiers of a house worth 20*l.* a year, and one is interested to the amount of 19*l.*, and the other only to the amount of 1*l.*, it appears they would both have a right to vote under the twenty-ninth section of the reform act.] (*174) (a) In *Bartlett*, app., and *Gibbs*, resp., the claim was, to vote for a house which the party had not occupied for a sufficient period. In point of fact he had occupied that house with another in succession, for the requisite period; and the court held that the successive occupation was the essence of the qualification. It was necessary that the party should give a description of the premises he had occupied during the required period; and not having done so, as to some of the premises, which he had occupied for part of that time, it was the same as if the description of the premises had been wholly omitted. That case has no application here, where the premises occupied during the whole period are properly stated. *The case of Joint Occupiers* will not assist the appellant. In that case, no argument is reported, and no authorities are cited. In the cases upon the settlement law the question has been, whether the nature of the premises was sufficient, and not as to the *occupation*.

At any rate the revising barrister had power to make the amendment if necessary, under the 40th section of the registration act; as by so doing,

understood of a *sole seisin*. *Snow v. Wiseman*, 2 Mod. 60, 1 Freem. 202, Com. Dig. tit. *Pleader*, (G. 2.); *Edwards v. Bishop of Exeter*, 5 New Cases, 652, 660.

(a) This appears to be so not only in the case of inequality in the ownership,—which is not inconsistent with equality in the occupation,—but even where there is an inequality of interest in the occupation; as where A. and B. are partners in the proportion of two and one, and the premises occupied for partnership purposes are of the value of 20*l.* only.

he would not supply a new or a different qualification, which he would have done in *Bartlett*, app., and *Gibbs*, resp. In this case the qualification would remain the same; all that would be introduced would be matter of explanation.

*175] **Kinglake*, Serjt., in reply. The question really is, what is meant by the term "nature of qualification?" The respondent contends it consists in the enumeration of the premises in the occupation of the voter; but it is submitted that it is, the nature of the occupation of premises of a certain description. The overseers have more opportunity than any other party of ascertaining the fact of joint occupation, inasmuch as the parties would be jointly rated. The length of the period of occupation, and the rating, form no parts of the qualification, and therefore it is not necessary that they should be stated.

TINDAL, C. J. The decision of the revising barrister appears to me to have been correct. The objection was, that the nature of the property in respect of which the party was qualified was improperly stated in the list. The nature of the qualification was stated to be "house and shop," and it is contended, that it ought to have been "joint occupation of house and shop." The question therefore is, whether, where the subject-matter of the qualification is in the joint occupation of two or more parties, it should be so stated. Now I think it clear, that we have no right to impose a condition, which is not required by the act 6 & 7 Vict. c. 18. The 13th section requires the overseers to make out a list of persons entitled to vote; which list is to be published by the overseers; and it is to be in the form numbered 3, in the schedule (B). Looking at that form, it has four columns; the first of which is headed, "Christian name and surname of each claimant at full length;" the second, "place of abode;" and the third, "nature of qualification;" and all the four columns are left blank. If that were the only form given either by this act or the former act, the 2 W. 4, c. 45, there might be some difficulty. In the form, No. 12, in the schedule (B.), to the 6 & 7 Vict. c. 18, entitled—"List of persons

*176] objected to, to be published by the overseers," the column headed "Nature of the supposed qualification" is left a blank. In the corresponding form, No. 7, schedule (I), to the earlier act, under the column which is similarly headed, is placed the word "shop." That is the *subject-matter* of the qualification—the *property* in respect of which the right of voting is claimed. And this argument is furthered by the fact that, in No. 1 of that schedule,—which is the form of the list of voters published by the overseers,—four instances are given under the column headed "Nature of qualification;" namely, "house," "warehouse," "shop," "counting-house;" which are the four very words mentioned in the body of the 27th section. It is therefore a fair inference, that in the column in the form under consideration, nothing more was intended to be inserted, than such matters as those of which instances are given in the schedule to the former act. It has been argued that as, under the 28th section of the 2 W. 4,

s. 45,—by which the premises in respect of which a party may vote need not be the same,—we have already decided, in *Bartlett*, appellant, and *Gibbs*, respondent, that each successive set of premises must be mentioned, we ought to carry the principle further, and extend it to the present case. But I do not think the same principle is applicable here. On the present occasion the subject-matter of the qualification is properly described. The nature of the occupation is only a *quality* or *incident*. The 27th section of the 2 W. 4, c. 45, gives the right of voting to the occupier of certain property, if he occupies as owner *or* tenant. But it is not required to be stated, whether his occupation is as owner or tenant. No more is it required to be stated that he has a joint occupation. In both cases, it seems that these are matters of evidence, from which it will appear whether he occupies as owner or tenant, and whether or not he has a joint occupation. Upon the whole, *therefore, I think the overseers [177 have complied with the requisites of the act; that the party has a right to vote, and has been properly registered.

MAULE, J. I also think the revising barrister was right. The question arises upon the construction of the 13th section of the 6 & 7 Vict. c. 18, and of the form No. 3, in the schedule (B) to that act. The title of the form is, “The list of persons entitled to vote in the election of a member, &c., for the city, &c., in respect of property occupied within the parish, &c.” This list contains four columns, each of which is differently headed; the third being headed “Nature of qualification.” No specimens are given in any of these columns. The 13th section requires the overseers to make out the list of persons entitled to vote, according to that form, and to state the different matters connected with every such person, according to the headings of the different columns, and, among others, “the nature of qualification.” In the present case, the overseers have used the term “house and shop” as descriptive of the nature of the qualification. It is not objected that it is not stated in what relation the party stands in respect to the house and shop; indeed, it is clear, that the meaning of the whole list is, that the party’s name placed upon that list is in respect of his occupation of the house and shop. Nor is it objected that it is not stated that the premises are of the value of 10*l.* a year; that, it is conceded, may be implied. But it is contended that it ought to have been stated that the premises in question were in the *joint* occupation of the party, together with certain other persons, not exceeding such a number, so that it might be ascertained whether the premises were of sufficient value to confer the franchise on all the occupiers. Perhaps if these or similar words were inserted in the list, they might afford an additional convenience to *objectors; (a) but the question is, are they *required* by the act? [178 It has been urged, that this is the same kind of information as to

(a) The withholding of such information would appear to be a reasonable ground for giving time to the objector, to enable him to prepare himself with evidence to negative the requisite additional year. 11e, and also for refusing costs.

the nature of the occupation as was held to be necessary in the case of *Bartlett*, app., and *Gibbs*, resp. In that case, there was a total absence of any statement as to portion of the premises occupied during the time required by the act. The list, as made out, left an objecting party in the dark, or rather misled him, as to what the premises were which formed the qualification of the voter. In that respect there was an unreasonable want of information. The overseers had no right to put a party on the list who had not occupied for a sufficient time the premises in respect of which his name was inserted. In the present case, though the insertion of the statement suggested would afford some convenience, I think the balance of inconvenience is the other way. Upon inquiry, the objecting party might learn whether there was a joint occupation, and whether the premises were of sufficient value. The joint occupation of premises is not analogous to any of those things that are given as examples in the corresponding schedule to the former act. It is to be remembered, too, that this is a list made out by the overseers, and not a claim sent in by a party. There appears to be some difference in the form of the notice of claim given by the 6 & 7 Vict. c. 18; and it may be possible that more strictness would be required in the case of a claim than with respect to the list made out by the overseers. By the fifteenth section, every person whose name has been omitted from the lists may send a claim according to the form No. 6, in schedule (B), to the overseers. That form runs thus: "I hereby give you •179] notice *that I claim to have my name inserted in the list made by you," &c., "and that the *particulars* of my qualification and place of abode are stated in the columns below." And it may be that the term "nature of qualification," which is the heading of the third column, may have a different meaning there from what it has in the form No. 3, where I think it must of necessity mean some kind of *property*. In the form No. 6, the "nature of qualification" may be something different from property, as shown by the heading of the last column, "street," &c., "where the property is situate," &c. [*when the right depends on property*]. The qualification may consist of some of the reserved rights. This view of the subject may also be fortified by considering that the term "particulars" is not used in the form No. 3. A party who makes a claim may easily state, with greater particularity, all the details of his qualification. Upon the whole, I agree with my lord chief justice, that the qualification of the voter was properly described in the list, and that the decision of the revising barrister must be affirmed.

CRESSWELL, J. I also am of opinion that the nature of the qualification has been sufficiently described by the overseers in the present instance. It appears, by the twenty-seventh section of the 2 W. 4, c. 45, that the right of voting for boroughs is given to the occupiers of certain premises, whether they occupy as owners or as tenants. By that act the overseers were required to make out a list of persons so entitled to vote, according to the form No. 1, of the schedule (I) to the act. That form has the same

heading as No. 3, in schedule (B) to the 6 & 7 Vict. c. 18. The heading, therefore, shows, in both cases, that it is a list of persons entitled to vote in respect of the occupation of property. Then the nature of the qualification that is to be stated is the *same as if the column were headed "nature of property occupied." This appears clear from the examples given in the schedule to the act of Will. 4, and though true it is that the corresponding column is left blank in the schedule to the act of Victoria, still there is nothing to show that more particularity is necessary under the latter statute than under the former. And there is no reason to impose on the voter or the overseers a greater difficulty than the act requires. The overseers are to describe the *premises* occupied by the party, not his *title*. The argument to be drawn from the form of the county list is strong in favour of the present view. The heading of that form is, "The list of persons claiming to be entitled to vote in respect," not of property *occupied*, but "of property;" (a) and therefore in the column headed "nature of qualification," the title of the party is to be given. This seems to me to afford a strong argument against the view put by my brother *Kinglake*. It has been contended that this is like a case of successive occupation; but that is not so. The overseers are bound to state the occupation of some property that would confer the franchise; and it is not sufficient to state property occupied for a period that would not confer the franchise. It is also said that a twelve months' occupation, and a being rated, are no parts of the qualification, and therefore they need not be stated in the list; so, also, the occupation by another party is surely no part of this voter's qualification. (b)

I am of opinion, therefore, that it is quite sufficient to *indicate certain property in the list; and that if any other party wishes to ascertain the title of the person whose name is inserted, he must make inquiry on the subject. (c)

ERLE, J. It seems to me also to be clear, that it is only necessary to specify the *property* in respect of which the qualification of the party exists, and not the *interest* of such party therein. Occupation need not be stated, for it is plain from the heading of the list that occupation is common to all the qualifications there stated. Neither is it necessary to state the value of the premises, or the rating of the occupier. All that is required is the nature of the property. The purpose of the list is to enable any party, who

(a) *Quære*, whether the term "occupied" may not be considered as tacitly imported from the provisions of the twenty-seventh section of the reform act. It seems to be clear that the omission of the word "occupied" would not justify the overseers in inserting property of which the party, though assessed to the poor-rate, neither was in the sole, nor the joint occupation.

(b) When the annual value is less than 20*l.*, the *exclusiveness* of the occupation may be said to be part of the qualification.

(c) *i. e.* as to the title to the vote, not as to the title to the property—an investigation of which, if practicable, would not always throw light upon the nature of the *occupation*. For the purpose of multiplying votes, it is not unusual for members of the same family to join in the household disbursements, and in paying the wages of servants, &c., more especially where the head of the family, the apparent occupier, is a female.

may doubt the right of any person to have his name inserted in the list, to make inquiries as to the title of such person. And this view is confirmed by a reference to schedule (I), No. 1, of the 2 W. 4, c. 45, which statute is *in pari materia* with the 6 & 7 Vict. c. 18. Every instance given in the schedule to the former act, is a description of *property*, and there is no allusion to the title in such property, or the manner of holding it. With reference to a notice of claim requiring greater particularity, I am disposed to think that, in such a case, the same description would be sufficient as in the list published by the overseers. The form of the notice of claim given in schedule (I), No. 4, 2 W. 4, runs thus: "I hereby give you notice that I claim," &c., "and that my qualification consists of a house in," &c. [*and* *182] *in the case of a freeman, say*, "and that my qualification is as a freeman of," &c.] And this, I think, shows what is meant by the "particulars" of the qualification mentioned in schedule (B), No. 6, of the 6 & 7 Vict. In counties, it is not necessary that the voter should be an occupier of the premises in respect of which he is entitled to vote; (a) and the list must therefore state whether he is freeholder or tenant, or occupier, if he should be so.

In the case of successive occupation, if only one set of premises is specified, it would imply that the party had occupied them for twelve months. He is therefore bound, when he has not done so, but has occupied other premises during that period, to show what those premises were.

Decision affirmed.

(a) Except under the 50*l.* tenancy clause.

BOROUGH OF BLACKBURN.

GEORGE DEWHURST, Appellant; JOSEPH FEILDEN, Respondent.
Jan. 27.

Two distinct buildings cannot be joined together in order to constitute a right to be registered as a borough voter under the 2 W. 4, c. 45, s. 27.

CASE. Joseph Feilden, described on the list of voters as "Joseph Feilden, of Witten," was objected to as not being entitled to have his name retained upon the list of voters for the said borough in respect of the occupation of property described in the said list as "joiner's shop, warehouse and land, in Thunder and Back Lane, in the said borough." Feilden was duly objected to by George Dewhurst, and appeared in support of his vote. Feilden has, together with his uncle, jointly occupied as own-
*183] ers, for a time sufficiently long *to confer a vote, (as far as regards the mere question of time and occupation,) a joiner's shop in Back Lane, worth, by itself, less than 20*l.* a year, and a warehouse in Thunder, worth 11*l.* a year, besides two yards in Thunder, occupied for the depos'

of stones and flags ; the two yards being worth together about 5*l.* a year. These several premises are the joint property of Feilden and his uncle, and are occupied jointly in manner above stated. Feilden and his uncle are the joint owners of considerable property in the borough, and they occupy the whole of the said premises as workshops and stone places, for the purpose of building on, and repairing their said property. The joiner's shop, the yards, and the warehouse, are worth together above 20*l.* a year ; but the joiner's shop alone is not worth 20*l.* a year, and the warehouse and yards alone are, together, not worth, independently of the joiner's shop, 20*l.* a year. Thunder, where the warehouse and the two yards are situated, is 300 yards distant from the joiner's shop ; and there are many buildings and other property, lying between the joiner's shop in Back Lane, and the warehouse and yards in Thunder ; which premises, so lying between the two, are the property, and in the occupation, of other and different persons. If the premises in Back Lane and those in Thunder can be united, so as to confer a vote on Feilden, they are of more than sufficient value for that purpose ; but if they cannot be united for that purpose, then the joiner's shop is of insufficient value to confer a vote on Feilden, and the warehouse and yards in Thunder are also of insufficient value to confer such vote.

I decided that Feilden occupied a joiner's shop, warehouse and land sufficient to entitle his name to be retained on the list of voters for the said borough, within the meaning of the 2 W. 4, c. 45, s. 27.

(Signed) S. T., revising barrister.

**Cockburn*, for the appellant. The question in this case is, [184 whether the buildings, not being within the same curtilage, may be joined together, so as to confer a vote under the twenty-seventh section of the reform act. [CRESWELL, J. It does not appear from the case, what was the value of the yard.] That point was not intended to be raised. The act confers the franchise on the occupier of "any house," &c., of a certain value ; that must mean any *one* house, in the same way as "a yearly rent," in sect. 20, has been decided to mean one single rent.(a) [TINDAL, C. J. The words are somewhat different. CRESWELL, J., referred to *Webb*, app., and *The Overseers of Aston*, resp., antè, Vol. V. p. 14.] That case seems decisive of the present question. (The learned counsel also referred to Sweetman's case, Alcock, Reg. Ca. 27.)

Kinglake, Serjt., for the respondent. The important thing to be considered is the value of the premises in the occupation of the voter ; and it is the same, in principle, whether that value is made up of one house or of more. The cases that have been decided under the tenements acts, the 59 G. 3, c. 50, and the 6 G. 4, c. 57, are strong authorities upon the point. In *Rex v. Macclesfield*, 2 B. & Ad. 870, it was held, that the taking of two dwelling-houses, held under the same roof, but having no internal communication, was sufficient under the 59 G. 3, c. 50, which requires the

(a) See *Gadsby*, appellant ; *Barrow*, respondent, antè, p. 21.

tenement to consist of a separate and distinct dwelling-house or building. In that case the court abstained from deciding whether the occupation of two distinct dwelling-houses, in different parts of the parish, would be sufficient; but in *Rex v. Tadcaster*, 4 B. & Ad. 703, 1 N. & M. 466, it was held that a house and a detached building might be joined together *185] under the 6 G. 4, *c. 57; and in *Rex v. Gosforth*, 1 A. & E. 226, 3 N. & M. 303, that a house and stable might be joined, though separated at a distance from each other. In *Rex v. Iver*, Id. 228, 3 N. & M. 28, where the pauper rented two houses under one continuous roof, the court came up to the point at which they had stopped in *Rex v. Macclesfield*, and determined that the renting of two houses *did* confer a settlement under the 6 G. 4, c. 57. Finally, in *Rex v. Newtown*, Id. 238, 3 N. & M. 306, they decided that the taking of two dwelling-houses, in different parts of the parish, was sufficient, under the 6 G. 4, c. 57. From these cases, Mr. Rogers, in his work on Election Law, page 179, 6th ed., draws the following conclusion: "If, under the words, 'a separate and distinct dwelling-house, or building, or land or both,' two houses may be joined; it would seem that under 2 W. 4, c. 45, s. 27, which requires the occupation to be of any house, warehouse, &c., two houses, or a house and a warehouse, or any other two members of the sentence may be joined, to complete the value." In *Webb*, app., and *The Overseers of Aston, &c.*, resp., ante, Vol. V. p. 14, the point in question was not argued, and the decision turned upon another ground; though it may, perhaps, incidentally, involve the present point. *Sweetman's* case is not very pointed. The decision in that case seems to have turned upon the sufficiency of the notice of claim. No reliance is to be placed upon the word "separately" in the twenty-seventh section of the reform act. It means nothing more than this,—that the house, &c., may be occupied with or without land; not that it must be a separate or single house, &c., that is to be occupied. The legislature, at the time of passing that act, evidently had the old scot and lot right of voting in view.

*186] **Cockburn* was not called upon in reply.

TINDAL, C. J. I think the revising barrister was wrong in the decision he came to in this case. The twenty-seventh section of the 2 W. 4, c. 45, gives the right of voting in boroughs to every person who occupies certain premises, either as owner or tenant. The subject-matter of such occupation is "any house, warehouse, counting-house, shop, or other building." The first observation—and one which lies on the very surface—is, that these words are all in the singular number, and that it would have been just as easy to have used the plural. But the section does not stop there. The subject-matter of the occupation is required to be, "either separately, or jointly with any land within such city or borough, occupied therewith by him the same landlord, of the clear yearly value of not less than 10*l*." So that if the house or building be not of that value, the amount may be made up by the conjunction of land. The rule *expressio unius exclusio est*

altrius is, I think, applicable here; and I cannot see why the legislature should have provided for the joint-occupation of a building and land, and not for that of two different buildings, if it had been intended that the latter should confer the franchise. This view is aided by the form of the list of voters to be published by the overseers, as given in the 6 & 7 Vict. c. 18, schedule (B), No. 3, where, in the fourth column, the "number of house (if any)" is required to be stated—which points more to a single definite building than to two or more united together. And it may very well be, that the occupier of a 10*l.* house might be considered in a fit condition to exercise the franchise, without its being intended that a party might make out the value, by joining together several small tenements.

MAULE, J. I am of the same opinion. The occupation of a 10*l.* house was probably intended as a test of the capacity and rank of the party to be intrusted with the franchise. Such a description of persons would be likely to be very different from those who occupied a number of tenements of smaller value. Suppose the legislature had given the franchise to a man who kept a horse of a certain value, taking that as a test of his rank and capacity. It would not have been the same thing if he kept a number of inferior horses to make up the value. I think we should not, in these appeals, involve ourselves with the decisions on settlement cases. We ought to be spared discussions upon the tenement acts, which are not at all upon the same subject as the reform and registration acts. The same reasons are therefore not applicable in the construction of them. In the present case the plain words of the act ought to prevail. [*187]

CRESSWELL, J. I think the case is really too clear for argument. In the very ingenious argument on the part of the appellant in *Webb*, app., and *The Overseers of Aston, &c.*, resp., this point was not argued; and it is not probable that it was omitted from any oversight.

ERLE, J. I am of the same opinion. The twenty-seventh section requires that *one* building, of a certain value, shall be occupied, in order to obtain the franchise, or land may be joined to the building; but if the land is occupied by the party as tenant, it must be held under the same landlord. It is not every species of *land* that may be joined to a building for that purpose. It is not correct, therefore, to say that the value alone was the criterion contemplated by the legislature. Decision reversed. (a)

(a) And see Mann. Prac. in Courts of Revision, 90, 115.

*188]

*HILARY VACATION.

CITY OF LICHFIELD.

MARSHALL, Appellant; BOWN, Respondent. Feb. 13.

A. having contracted for the purchase of B.'s house for a valuable consideration, sold it to C. D., E., F., G., and H. in equal shares; and caused a conveyance to be executed from B. to the sub-vendees, as tenants in common. A. was not stated to have been a party to the conveyance, the purchase-money was paid to B. by the hands of A., but was the proper money of the sub-vendees. The house was let, and the sub-vendees received the rents for their own use respectively. The object of A., in proposing the purchase to the sub-vendees, was to increase the number of voters; but the purchase, on the part of the sub-vendees, was a *bonâ fide* investment of their money; they expected that the possession of the property would entitle each of them to vote, but there was no understanding before or at the conveyance that they should vote in any particular way, or in support of any particular interest.

Held, that the conveyance was not void under the 7 & 8 W. 3, c. 25, s. 7, and that the sub-vendees were entitled to be registered.

Quære, if the conveyance would have been void if the increasing the number of voters had been the object of B. in conveying.

CASE. William Marshall objected to the name of John Bown, and to those of five others, being retained on the second list of voters for the parish of St. Michael, in the city of Lichfield. I retained all the names subject to the opinion of this court upon the following case:—

The parliamentary borough of the city of Lichfield is a county of itself, and, prior to the passing of stat. 2 W. 4, c. 45, freeholders had the right to vote in the election of members for the said city. In the second list of voters, duly made out by the overseers of the parish of St. Michael in the said city, the following six names appeared:—

| Christian name and surname of each. | Place of abode. | Nature of qualification. | Street, lane, or other place in this parish where the property is situate. |
|-------------------------------------|-----------------|--------------------------|--|
| Bown, John. | Wade Street. | Freehold house. | St. John Street. |

*189] *(The other five names were inserted with the same qualification.)

Objections were duly made to each of the above names being retained in the said list in respect of the above qualification; and upon their appearing to support their title to have their names retained in the said list, it was proved that the names of Bown and the other five, were inserted in the said list in respect of the same freehold house in St. John Street, and that they became and were the joint owners of it, under the following circumstances:—

Prior to Lady-day, 1843, one William Gorton contracted, in his own name, with the then proprietors of the house, for the purchase of it at the

price of 292*l.* 5*s.* 0*d.*; and having, after such contract, *bonâ fide* sold the house to Bown and the five other persons above named in equal shares, he caused a conveyance of it, from his vendors to Bown and the five others, to be prepared by their solicitor. By this conveyance, which was afterwards duly executed by the vendors, the said house was, in consideration of the said sum of 292*l.* 5*s.* 0*d.*, absolutely conveyed to Bown and the five other persons, to hold to them in undivided sixth parts, as tenants in common, in fee. The purchase money was paid to the vendors by the hands of Gorton, but was the proper money of Bown and the five others contributed by them in equal shares. The house was let to a respectable tenant at 15*l.* a year, and was worth, at least, that rent. The object of Gorton in proposing the purchase to Bown and the five others was, to increase the number of the voters for the city of Lichfield; but the purchase on the part of Bown and each of the above-named persons, was a *bonâ fide* investment of their money, which they would not have made unless they had been satisfied with the value of the premises and the income they were to receive from the investment. They also all expected that *the possession [190 of the property would entitle them to votes for the city of Lichfield; but there was no stipulation or understanding, before, or at the time of, the conveyance to them, that they or any of them should vote in respect of the said house, in any particular way, or in support of any particular interest.

Bown and each of the others had been in the receipt of 50*s.* in respect of their shares of the rent and profits of the said house for his own use, for twelve calendar months next before the last day of July, 1844, the said 50*s.* having been paid to each of them by the said W. Gorton out of the rent, which Gorton was authorized to receive on their behalf; and each of them had resided for six calendar months next before the last day of July within the said city, or within seven statute miles thereof.

It was objected that the conveyance was void and of none effect, by reason of the provisions of stat. 7 & 8 W. 3, c. 25, s. 7, (a) as being made to them in order to multiply voices, and to split and divide the interest in such house; and that under that act, no more than one single voice ought to be admitted for the said house.

I was of opinion that there had been a *bonâ fide* purchase of the [191 house by Bown and the five other persons, *for a valuable consideration; and that the seventh section of the said statute did not apply to a

(a) 7 & 8 W. 3, c. 25, s. 7, enacts, "that no person shall be allowed to have any vote in election of members to serve in parliament, for or by reason of any trust,—estate, or mortgage, unless such trustee or mortgagee be in actual possession, or receipt of the rents and profits, of the same estate; but that the mortgagor, or *cestui que trust*, in possession, shall and may vote for the same estate, notwithstanding such mortgage or trust; and that all conveyances of any messuages, lands, tenements, or hereditaments, in any county, city, borough, &c., in order to multiply voices, or to split and divide the interest in any houses or lands among several persons to enable them to vote at elections of members to serve in parliaments, are hereby declared to be void and of none effect, and that no more than one single voice shall be admitted for one and the same house or tenement."

conveyance made under such circumstances ; and that the provision "that no more than one voice shall be admitted for one and the same house or tenements," related only to boroughs in which, at the time of the passing of the act, the right of voting was in householders, or inhabitants paying scot and lot ; and I was of opinion, on the whole case, that Bown and the other five persons were entitled to have their names retained in the list of voters for the city of Lichfield, in respect of their respective share in the said freehold house.

Similar objections were also made by Marshall, to retaining in the same list for the parish of Saint Michael aforesaid, the names of five persons described in the said list as follows :—

(The names of William Field and four persons were inserted in the list in respect of the same description of qualification as in the former case.)

The names of the five last-mentioned persons were inserted in the said list in respect of one freehold house adjoining that mentioned in the preceding case, of which they had become the *bonâ fide* purchasers for a valuable consideration, and were in receipt of the rents and profits, amounting to 15*l.* a year, and which had been contracted for and conveyed to them at the same time, and by the same parties, under similar circumstances to those above stated.

(The cases were consolidated.)

(Signed) J. B., revising barrister.

The question for the opinion of the court is, whether the conveyance to Bown, and the five other persons, of the freehold house first above mentioned, and the conveyance to Field, and the other four persons, of the *192] freehold house secondly above mentioned, respectively, is void and of none effect under stat. 7 & 8 W. 3, c. 25, s. 7, and whether, under the said act, Bown, and the five other persons, or any of them, is or are entitled to have his or their name or names retained in the said list of voters, and to be admitted to vote in respect of the first of such houses, and Field and the other four persons, or any of them, in respect of the last of such houses respectively.

(Signed) T. B., revising barrister.

The case was argued in last Michaelmas term.(a)

Byles, Serjt., for the appellant. The decision of the revising barrister contravenes the provisions of the 7 & 8 W. 3, c. 25, s. 7. It is not necessary to consider how committees of the House of Commons have endeavoured to fritter away that statute. The intention of the vendor is the material thing to be considered, and not that of the vendee.

Kinglake, Serjt., for the respondent. It is material to consider what was the state of the law before the 7 & 8 W. 3, c. 25, was passed. Before that act, the possession of a freehold, for one day only before the voting, was sufficient. The act was intended to apply only to collusive conveyances,

(a) *Thursday*, November 21st, before Tindal, C. J., Coltman, Maule, and Erle, J.

that were subject to certain conditions. The 10 Ann. c. 23, s. 1,^(a) may be considered *as a legislative interpretation of the former act. The form of the freeholders' oath, given in the 18 G. 2, c. 18, s. 1, [*193 extended to cities being counties of themselves, by the 19 G. 2, c. 28,^(b) and the provisions of section 4 of the latter act^(c) are material in the same view. A *bonâ fide* conveyance, for a valuable consideration, cannot be said to be made on purpose to multiply voices. The effect of the 7 & 8 W. 3, c. 25, was much discussed in the *Okehampton* case, 1 Peckw. 359; out the counsel who supported the view now submitted on behalf of the appellant, did not put the argument so high as it has now been done. *Elphinstone's* case, 3 Luders, 370, was there referred to, and is in point. [MAULE, J. It is *not found in this case, that the conveyance [*194 was made in order to multiply voices, in the terms of the statute. TINDAL, C. J. The case mentions that it was the intention of an intermediate party, Gorton, to increase votes for the city. That does not seem to have been the object of the vendors; and *that* appears to be the material thing to bring the case strictly within the act.] In every case where a party purchases a freehold estate, he may probably intend to acquire a vote, but that will not deprive him of his right to do so.

Byles, Serjt., in reply. Gorton had an equitable estate in the property, and *he* conveyed with the intention to multiply voices. The case is therefore clearly within the mischief contemplated by the act. By the first part of the seventh section of the 7 & 8 W. 3, c. 25, a mortgagee is not to vote unless he is in possession. Suppose a mortgagor wished to multiply voices,

(a) 10 Ann. c. 23, s. 1, after reciting the 7 & 8 W. 3, c. 25, s. 7, "for the more effectual preventing of such undue practices," enacts "that all estates and conveyances whatsoever made to any person or persons, in any fraudulent or collusive manner, on purpose to qualify him or them to give his or their vote or votes at such elections of knights of the shire, (subject nevertheless to conditions or agreements to defeat or determine such estate, or to reconvey the same,) shall be deemed and taken, against those persons who executed the same, as free and absolute, and be holden and enjoyed by all and every such person or persons to whom such conveyance shall be made as aforesaid, freely and absolutely acquitted, exonerated, and discharged of and from all manner of trusts, conditions, clause of re-entry, powers of revocation, provisos of redemption, or other defeasances whatsoever, between or with the said parties, or any other person or persons in trust for them, or any of them, for the redeeming, revoking, or defeating such estate or estates, or for the restoring or re-conveying thereof, or any part thereof, to any person or persons who made or executed such conveyance, or to any other person or persons in trust for them, or any of them, shall be null and void to all intents and purposes whatsoever, and that every person who shall make and execute such conveyance or conveyances as aforesaid, or, being privy to such purpose, shall devise or prepare the same, and every person who, by colour thereof, shall give any vote at any election of any knight or knights of the shire to serve in parliament, shall, for every such conveyance so made, or vote so created or given, forfeit the sum of 40*l.*," &c.

(b) The form of the oath given in the 19 G. 2, c. 28, s. 1, is as follows:—

"You shall swear, &c., that you have a freehold estate consisting of, &c., lying or being in the city and county, &c., of the clear yearly value of 40*s.*, &c., and that you have been in the actual possession or receipt of the rents and profits thereof, for your own use, above twelve calendar months, &c., and that such freehold estate has not been granted or made to you fraudulently, on purpose to qualify you to give your vote," &c.

(c) 19 G. 2, c. 28, s. 4, enacts (*in'er alia*) that "no person shall vote in respect or in right of any freehold estate which was made or granted to him fraudulently, on purpose to qualify him to give his vote."

and sold his equitable estate with that intention, and got the mortgagee innocently to join in the sale, surely that would be within the statute. This being a highly remedial act is not to be construed strictly. [ERLE, J. It can hardly be said to be that; as it avoids the conveyance, though there may have been a good consideration. TINDAL, C. J. It would certainly be very hard that the conveyance should be avoided after the money had been paid by reason of the intention of the vendor, if the vendee was ignorant of such intention. MAULE, J. Your construction would amount to this,—here has been a fraud by one man, for which another is to be punished. The vendor here is the guilty party, if any, not the vendee.] The vendee might recover the money, if he is innocent, as the consideration is illegal and has failed. [TINDAL, C. J. But he may have laid out money, and built upon the estate before the illegality of the vendor's intention was discovered.] Gorton may, for *all purposes, be considered as the
 *195] vendor, and the conveyance as *his* conveyance, within the statute. Three sorts of fraudulent conveyances are contemplated by the legislature. Those of the first class are provided for by the 7 & 8 W. 3, c. 25; the second, by the 10 Ann. c. 23; and the third by the statutes of G. 2. These acts point to totally different abuses. *Cur. adv. vull.*

TINDAL, C. J., now delivered the judgment of the court.

The objection taken against the claim of Brown, and of the several other persons mentioned in the case, to their right of voting, as freeholders, in the election of members for the city of Lichfield, was this,—that the six persons therein first named claimed the right of voting in respect of one and the same freehold house, and that the conveyance to those persons was void under the provisions of the act 7 & 8 W. 3, c. 25. That statute enacts that “all conveyances in order to multiply voices or to split and divide the interest in any houses or lands among several persons, to enable them to vote at elections of members to serve in parliament, are hereby declared to be void and of none effect.”

The argument before us proceeded upon the supposition that the facts of the present case brought it within the scope and operation of that statute; and we are called upon to give the legal construction of that statute with reference to the abstract question, whether a *bonâ fide* conveyance, where the money was really paid by the purchaser, and there was no secret trust or reservation in favour of the seller, but where the object of the conveyance was to multiply voices and to split and divide the interest, falls within the provisions of that statute. Whenever the question comes before us, we
 *196] shall be prepared to give our opinion upon it; *but, as we think the facts stated in this case do not raise the question, it would be premature to do so on the present occasion. For, we think the obvious meaning of the statute is, that in order to make the conveyance void, *the seller* must be party or privy to the illegal object intended by the conveyance; for, it would indeed seem to be an unreasonable consequence, and one which could never have been in the contemplation of the legislature, that a

person who sold property *bonâ fide* to several persons as purchasers, having no intention himself to evade the estate, no knowledge of any such object or design on the part of the purchasers, should afterwards, and at any distance of time, find the conveyance void, the land thrown back upon his hands, and himself liable to return the purchase money, on account of its having been subsequently discovered that the purchase was made by the several persons to whom it was conveyed in order to split and divide the interest and to multiply votes. And the necessity for this privity and intention on the part of the seller, appears further from the subsequent statute 10 Ann. c. 23, which, after reciting the statute of W. 3, and that the subsequent statute was made for the more effectual preventing of such undue practices, proceeds to make provision for cases in which the object of the conveyance cannot but be known to the party who conveys the estate: and is still further evident from the 53 G. 3, c. 49, which enacts that a devise made for the same purpose shall be taken to be a conveyance within the meaning of the former statutes.

Now, looking at the case before us, there is not only no statement of the fact, but no reason to infer the fact, that the former proprietors of the house, who were the conveying parties, had any knowledge whatever of the object for which the house was purchased, at the time they executed the conveyance to the six claimants. *Gorton contracted in his own name with the proprietors for the purchase of the house, such proprietors, so far as appears, not having any knowledge whatever of any of the six persons to whom the conveyance was afterwards made, before the actual execution of the conveyance. Then, Gorton, as it is stated, after entering into the contract, *bonâ fide* sold the house to Bown and the other five claimants; and all that was done by the proprietors was, that, upon the request of Gorton, they executed the conveyance to such new purchasers. [*197]

And, as to the argument urged on the part of the appellant, that Gorton may be considered as the vendor, and the conveyance taken to be *his* conveyance, within the meaning of the statute, it appears a sufficient answer, that, upon the facts stated in the case, there is no proof that he had any thing to convey, or even that he was a party to the conveyance which is contended to be void under the statute.(a)

As the case, therefore, seems to us not to be brought within the statute, we are of opinion that the objection taken before the revising barrister never properly arose; and therefore, without giving any opinion upon the merits of the objection, it is sufficient to say the names of the six claimants in respect of the first purchase, and of the five claimants in respect of the second purchase, (which was made under circumstances precisely similar to those of the first,) were rightly retained on the list.

We therefore give our judgment for the respondents. Judgment affirmed.

(a) It was assumed in the argument, (*suprà*, 194,) although not stated in the case, that Gorton,—for the purpose of extinguishing his interest, as equitable owner under the contract of sale to him,—had joined in the conveyance from his vendors to the sub-vendees, according to the usual practice.

*198]

*EASTER VACATION.

WEST RIDING OF YORKSHIRE.

ROBERT BAXTER, Appellant; EDWARD BROWN, Respondent.

A, B., C., and D. joined in a partnership to work a fulling mill. Money was subscribed by all the partners; with part of which freehold land was bought, which was conveyed to A. and B. in fee; with other part a mill was built on the land, and machinery for the mill was purchased. By a partnership deed executed by A., B., C., and D., the trusts of the land, mill, &c., were declared to be, (among other things,) that A. and B. should stand seised and possessed of all the estates, property, goods, &c., upon trust for the benefit of themselves and their partners as part of their partnership joint stock in trade; there was a provision in the deed that A. and B. might borrow money upon mortgage of the stock, property, estates, &c., belonging to the copartnership; and it was declared that the land, mill, &c., should be deemed and considered as or in the nature of personal estate, and not real estate, and be held in trust for the partners as part of their partnership stock in trade. A. and B., under the powers of the deed, borrowed money for the purposes of the partnership, for which they gave bonds and notes in their own names, but did not mortgage any part of the property.

Held, that each partner had an interest in the realty corresponding with the amount of shares held by him in the partnership.

Held, also, that the money so borrowed had not the effect of mortgages on the shares of the partners.

CASE. Jonas Bateman, John Brookbank, and thirty-five other parties, claimed, at the revision of the list of voters for the west riding of the county of York, A. D. 1844, to be entitled to vote for the west riding, in respect of freehold shares in a mill, houses, and land, situate in the township of Pudsey, in the polling district of Bradford in the said riding.

The claimants joined many other persons in forming a partnership to build and carry on their respective trades in a mill, which was built in manner hereinafter mentioned. Money was subscribed by all the partners, *199] part of which was appropriated to buy freehold lands, *which were conveyed unto and to the use of certain trustees, their heirs, and assigns absolutely. Other part of the money was appropriated to build the mill upon such lands; and the remainder was appropriated to buy machinery for the mill. By a general partnership deed executed by the trustees, the claimants and all the other partners, the trusts of the freehold lands so conveyed and of the mill then to be built, the machinery and every thing belonging or appertaining to the said lands, mills, and premises, were declared to be—that the said joint concern, trade, and business should at all times during the continuance of the copartnership be conducted and carried on in the names of the trustees, and the survivors and survivor of them. “And that all and singular the estates, property, goods, chattels, and effects belonging, or which shall belong to, or which have been, and shall from time to time be purchased by, or for, or on account of the said partnership, or for carrying on the said joint concern, trade, or business, shall be conveyed, transferred, delivered, and assigned to, and invested in,

such trustees or trustee for the time being, who shall at all times stand seised and possessed thereof, and interested therein, upon trust, for the benefit of themselves and their partners in the said joint concern, as part of their partnership joint stock in trade." And that all contracts, dealings sales, purchases, payments, receipts, bills, notes, drafts, orders, securities actions, suits, proceedings, matters, and things whatsoever, for, on account, or in respect of, or relating to the said joint trade, should be and be carried on in the names of the said trustees or trustee for the time being.

There were also other provisions in the deed, in the words following:—

"That at all times, and from time to time, during the copartnership, it shall be lawful to and for the *trustees for the time being, at the request and by the direction of three-fourth parts in value of the [*200 partners who shall be present, either in person or by proxy, at any general meeting to be held after ten days' previous notice thereof in writing, to be affixed on the principal door of the said mill, by the committee for the time being, to take up, borrow, and raise upon the credit of the said joint trade, or by or upon mortgage, or other security, of all or any part or parts of the stock, property, estate, or effects of and belonging to the said copartnership, any such sum or sums of money to be employed in the said joint trade as such three-fourth parts of the said partners as such last above-mentioned, or any other general meeting to be held in like manner, shall order or direct; and that each and every of the said parties hereto, his, her, and their executors, administrators, and assigns, shall and will pay his, her, and their share of all and every sum and sums of money which shall be so taken up, borrowed, and raised, in proportion to the number of shares he, she, or they shall hold in the said joint trade. And it is hereby agreed and declared, *that the said lands* contracted to be purchased as aforesaid, *and the mill and other buildings* which have been, and shall be, erected and built thereon, and all other lands, tenements, and hereditaments which shall be purchased by, with, or out of the copartnership joint-stock moneys and effects, and be received in exchange, *shall be deemed and considered as, or in the nature of, personal estate, and not real estate*, and shall be held in trust for the said several parties hereto respectively, and their respective executors, administrators, and assigns, as part of their partnership stock in trade, and in the same parts, shares, and proportions as they are, and from time to time shall be, interested in, or entitled to, their partnership stock in trade, moneys, and effects: and it is hereby declared *and agreed [*201 that the person or persons who shall advance or pay any money to the trustees or trustee for the time being of the said copartnership or company, their or his heirs, executors, administrators, or assigns, under their or his direction, upon any mortgage or mortgages, or other security of, or upon all or any part or parts of the said copartnership joint property, estates, and effects, or upon any exchange of the same or any part thereof, or otherwise pursuant to these presents, shall not be obliged or required to see to the application of such money, or be answerable or accountable for misap-

plication or non-application of the same, or any part thereof, or to see or inquire whether any order, authority, or direction for any such mortgage or security, or exchange, be made pursuant, or in conformity, to the powers, authorities, and directions herein contained; and that all receipts which shall be given by the said trustees or trustee for the time being, any or either of them, or his, their, or any or either of their heirs, executors, administrators, or assigns, agent or agents, or by any other person or persons to whom the same money shall be paid, under their or his direction, shall be good and sufficient discharges for the sum and sums of money which therein or thereby shall be expressed or acknowledged to be, or to have been, received; and that every mortgage and security, and conveyance by way of exchange, which shall be made, executed, or given, by the said trustees or trustee for the time being, or any, or either of them, his, their, or any, or either of their heirs, executors, administrators, or assigns, shall be binding and conclusive on all the said partners, and their respective heirs, executors, administrators, and assigns. Provided also, and it is hereby further declared and agreed, that the persons elected, or to be elected, on all and *202] every the present and future trustees and trustee thereof, and *their respective heirs, executors, and administrators, shall now and always stand and be indemnified and saved harmless by the said copartnership in and for all lawful acts, deeds, and transactions done, performed and executed in pursuance, and by virtue, of these presents; and the lands, stock, property, estates, and effects of, and belonging to, the said company or copartnership, shall, in the first place, be appropriated and applied,—and the same is, and are, hereby declared to be subject and liable,—to indemnify, exonerate, and discharge them, and every of them, of, from and against all actions, suits, and prosecutions whatsoever, and also to reimburse them, the said committee, trustees and trustee, and every of them, for the time being, their, and every of their heirs, executors, and administrators, estates and effects, all such costs, charges, expenses, and demands, as shall or may happen or arise to them, or any of them, or which they or any of them shall reasonably expend, sustain or be put unto, and also subject and liable to such a reasonable allowance to the said committee for their loss of time, as a majority of the said partners shall adjudge in, for and concerning the trusts aforesaid, or any of them, or the execution or performance thereof.”

The said mill was built according to the terms of the partnership-deed, and the business and trade were carried on therein, in manner following:—

The concerns of the company were managed by a committee, appointed by a general meeting of shareholders; and the committee were in the occupation of the mill and premises, and employed servants to work it. The mill was used for the purpose of fulling cloth. The shareholders did not carry on one trade jointly together, but each shareholder brought his own cloth to be fullled at the mill. If any other person who was not a share-

holder brought cloth to be fullled at the mill, *he was charged a certain sum for the use of the mill, which was paid to the committee; and every shareholder who brought cloth to be fullled at the mill, was debited with the same sum proportionally, for the amount of cloth which he had fullled at the mill, in the general annual settlement of the profits arising from the use of the mill. [*202]

The trustees had, under the power of the partnership deed, and with the consent of the general meeting of the shareholders, borrowed sums of money for the purpose of the mill, for which they had given bonds and notes in their own names only; and no part of the partnership property had been mortgaged.

The personal property of the company was greater in amount than the sums so borrowed by the trustees, and was sufficient to meet such sums and interest thereon, and all other liabilities incurred either by the company or by the trustees in their behalf.

The amount of shares possessed by each of the above claimants respectively in the real property of the company, was sufficient to confer a vote, provided the interest acquired by such shares could be considered as an interest in reality; but it was objected before the revising barrister, that the interest acquired by the above claimants as the owners of shares, was only an interest in personalty.

With regard to Bateman and J. Brookbank, it was objected that the money so borrowed by the trustees on bonds and notes as aforesaid, should be considered as a *mortgage* on the real property of the company, and that such sums, with interest thereon, should be deducted from the value of the real property.

I overruled the objections in the case of each of the above claimants, and allowed the votes of each claimant respectively.

If this court are of opinion that under the said *partnership deed the shares of the said claimants respectively in the said property of the company, cannot be considered as a legal or equitable interest in real property, then the votes of each of the above claimants respectively are to be disallowed. Or, if this court are of opinion that the sums of money so borrowed by the trustees as aforesaid, ought to be considered at law or in equity as a charge on the real property of the company, then the right of voting of each of the above claimants, Bateman and Brookbank, to be disallowed, otherwise the decision of the revising barrister to be confirmed. [*204]

(The cases were consolidated.)

(Signed) P. A. P., revising barrister.

The case was argued in last Hilary term, (16th January.)

R. Hildyard, for the appellant. The claimants had only an interest in personalty; the trust deed expressly declaring that the lands, mill, and other buildings, shall be considered as personal, and not as real estate. The question, a few years back, might have created some difficulty; but it

is now set at rest by the case of *Bligh v. Brent*, 2 Yo. & Coll. 268, where the question was whether shares in the Chelsea waterworks would pass by will not executed according to the statute of frauds. ALDERSON, B., who delivered the judgment of the whole court of Exchequer, after stating the provisions of the act of parliament and charter from the crown, by which the company was constituted and incorporated, and the mode in which the undertaking under the powers thereby conferred on the corporators had been carried into effect, proceeded to observe:—"In the first place we have a corporation to whose management the joint-stock money subscribed *205] by its individual corporators is intrusted. *They have power of vesting it, at their pleasure, in real estate, or in personal estate, limited only in amount, and of altering from time to time the species of property which they may choose to hold; and, in order to give them greater facilities and advantages, certain powers are intrusted to the undertakers by the legislature,—and *that* even before they were constituted a body corporate,—of laying down pipes, and thereby occupying land for the purposes of the undertaking. These powers render the use of the joint stock by the body corporate more profitable, but they form no part of the joint stock itself; and one decided test of this is, that they belong inalienably to the corporation: whereas all the joint stock is capable expressly of being sold, exchanged, varied or disposed of, at the pleasure of the corporate body. It is of the greatest importance to look carefully at the nature of the property originally intrusted, and that of the body to whose management it is intrusted; the power that body has over it; and the purposes for which these powers are given. The property is money, the subscriptions of individual corporators. In order to make that profitable, it is intrusted to a corporation, who have unlimited power of converting part of it into lands, part into goods, and of changing and disposing of each, from time to time; and the purpose of all this is, the obtaining a clear surplus profit, from the use and disposal of capital, for the individual contributors. It is this surplus profit alone which is divisible among the individual corporators. The land or the chattels are only the instruments (and those varying and temporary instruments) whereby the joint-stock money is made to produce profit. Suppose the subscription had not been by the individual corporators, but that strangers, having collected the money, had put it into the management of a corporate body having particular privileges; and had, *206] after giving them *power to vest the money at their pleasure, stipulated to receive these profits; could it be contended that the nature of the property of the subscribers depended on the mode of management of the independent body? And yet that is, in truth, this case; for, the individual members of a corporation are quite as distinct from the metaphysical body called 'the corporation,' as any other of his majesty's subjects are." The principles deducible from that case, are confirmed by *Bradley v. Holdsworth*, 3 M. & W. 422. The question there arose under a railway act, by which it was declared that the shares in the undertaking, or

joint stock and fund of the company, should, to all intents and purposes, be deemed personal estate, and be transmissible as such, and should not be of the nature of real property : and it was held that the shares of individual proprietors were not an interest in land, and therefore might be sold by a verbal contract.

Martin for the respondent. A decision in favour of the appellant in this case would have the effect of disfranchising and disqualifying a large body of electors. [CRESSWELL, J. They would not be *disqualified*. They would only be disentitled to vote in respect of this particular franchise.] It is submitted that the claimants had an interest in real property. The fact of an account being to be taken of the profits will not prevent its being real estate. [MAULE, J. It seems that the partners in the concern were treated much in the same way as strangers. I do not see how the method of carrying on the business can vary the rights of the parties.] If two farmers were occupiers of a barn and threshing-machine, and threshed corn for the public as well as their own corn, that would ultimately be a beneficial *enjoyment of real property. [CRESSWELL, J. The claim [*207 here is, not in respect of occupation. It is a question of title. TINDAL, C. J. The occupation is in the committee. The claimants claim a right to be registered as owners.] If this is not an interest in real property, it is difficult to say what interest it is. As soon as a thing is affixed to land it becomes real property ; although possibly the party placing it there may be entitled to remove it under certain circumstances ; but as long as it remains there it is real property. The statement in the trust deed that the property shall be considered as, or in the nature of personal estate, does not affect the question. If a firm were the owners of a counting-house, and in the partnership deed it was agreed that it should be considered for the purposes of the partnership as personalty, that would not alter the legal character of the property. So, if a man left real property to his executors to be divided like personalty, his wish would be carried out ; but the nature of the property would remain unaltered. That doctrine was laid down in *Barker v. May*, 9 B. & C. 489, 4 M. & R. 386. [CRESSWELL, J. The argument on the other side amounts to this—not that the legal or equitable estate is altered ; but that there is no real estate in the claimants or their trustees.] That would be in effect to alter the nature of the estate. That can no more be done by agreement or by contract than by will. [MAULE, J. In *The Attorney-General v. Mangles*, 5 M. & W. 120, a testator, by his will, after certain legacies, gave, devised, and bequeathed unto his executors, their heirs, executors, and administrators, all the rest and residue of his estate, real and personal, upon trust, at such times as they might think fit, to *sell, convey, or otherwise convert into money*, the same, or any part thereof ; and the testator directed that all the residue of his estate should be invested as it *should be realized, and should be divided amongst [*208 all his children, in certain shares and proportions ; and the testator directed that his trustees should have full power, in making such sales as

in the said will were *directed*, to resort to either public or private sale, and to buy in and resell, and to defer any sale so long as they might think fit, and of causing any part or parts of his the testator's real or personal estate to be valued instead of being sold, and of allotting such parts to any or either of his the said testator's children at the amount of the valuation as a part of his or her proportion of his residuary estate, but to be considered as personal estate, and subject to the trusts in the said will declared respecting such proportions of residuary estate. The testator, at the time of his death, had one son and four daughters. The trustees, after the testator's death, sold a large part of the real and personal estate, amounting to 180,000*l.*, and caused the remaining part of the residue, which consisted of real estate, to be valued, and the same was valued at 90,000*l.*, which was the son's share of the residue; and the sums of 45,000*l.*, each amounting to 180,000*l.*, were the shares of the daughters. The trustees allotted the estate which had been so valued at 90,000*l.* to the testator's son, at the amount of the valuation, and retained the sum of 180,000*l.*, the proceeds of the part which had been sold for the benefit of the four daughters; and it was held that legacy duty was payable upon the amount of the part which was actually sold, but not upon the part which the trustees had allotted to the testator's son, under the discretionary power contained in the will. That case appears to be in your favour.] The parties interested in this will use their own property and divide the profits. This is not like the case of a railroad, as in *Bradley v. Holdsworth*; for there the land forms but a very minute portion of the stock; and a shareholder would

*209] not have such an *interest in land as would confer the franchise.

[ERSKINE, J. Would it make any difference if he had the particular right to travel on the line in his own carriage?] It is submitted that it would; and that if his share was of sufficient value in any one county, that would give him the right to vote. [ERSKINE, J. Would it not be a mere easement?] It would rather be a right of way over land which was vested in trustees in trust for himself and others; and that, it is submitted, would be an interest in land. In *Bradley v. Holdsworth*, also, it was expressly provided by the railway act that the shares should not constitute an interest in land. The present case is also very distinguishable from *Bligh v. Brent*. Here the parties have not merely an interest in the surplus profits, as was the case there. Moreover, there the land was vested in a corporation; and individual members of a corporation have no legal interest in the land. This distinction was ably pointed out in the argument for the respondents in *Ex parte The Lancaster Canal Company*, Mont. & Bligh, 94, 1 Deac. & Chitt. 411, as follows:—"Corporators have two characters: the individual and the corporate. Can any individual, in his character of corporator, because there is land, or an interest in land vested in the corporate body, have a right of voting for a member of parliament, or a qualification to sport? No individual of a corporation can have any seisin, or right, in respect of the corporate property. The entire

fee of the real estate is in the corporate body." Mont. & Bligh, 106. And, again, "If a share in corporate or joint stock becomes real property, because the corporation or company acquires an interest in land, the case must be universal. The Bank of England has laid out money on mortgage; does that give a chattel (*a*) interest to the holders of bank stock? *Does the purchase of East India stock give an interest in the territories of the East India Company? But in both instances there is real estate belonging to the corporate body." Mont. & Bligh, 109. [ERSKINE, J. Would it make any difference in the present case if the trustees had been a corporation?] It would not; because the *cestui que trust* would be beneficially interested; if indeed a corporation can, strictly speaking, take a trust. [MAULE, J. In the case of a corporation it is the whole body—the abstraction of law—that is seised. The members are no more seised than the members of a man's body could be said to be seised of his estate.] In *Buckeridge v. Ingram*, 2 Ves. jun. 652, the question related to the shares in the Avon navigation. And the master of the rolls observed, "I have no difficulty in saying that wherever a perpetual inheritance is granted, which arises out of lands, or is in any degree connected with it, or, as it is emphatically expressed by Lord COKE, exercisable within it, it is that sort of property the law denominates real, and cannot pass by a will without three witnesses." A similar principle had been previously established, with regard to the shares in the New River Company, in *Townsend v. Ash*, 3 Atk. 336.(b) [CRESSWELL, J. In the course of the argument in *Bligh v. Brent*, PARKE, B., made this observation: "Suppose lands to have been purchased for the purpose of an undertaking, and to have been conveyed to certain parties, who executed a deed of trust, upon trust to divide the surplus profits among the original subscribers; would their having the surplus profits give the original subscribers any estate in the land? It appears to me that the company are as much distinct from the proprietors of shares as one man is *from another." His lordship was probably thinking, at the time, of a corporation. At most, the observation was extra-judicial. Later in the argument, Lord ABINGER C. B., said, "If a joint-stock company purchase property, each individual shareholder has an interest in it; but the moment the company becomes a corporation, the corporation has the property in trust for the individuals. That proceeds on the principle that a man cannot be trustee for himself." This seems to be inconsistent with the previous remark of PARKE, B. [CRESSWELL, J. It does not appear so to me. TINDAL, C. J. The question in this case really is, whether the trustees are so in respect of the realty, or in respect of the profits. MAULE, J. Some of the terms in the trust deed appear to be inconsistent. In one place the property is spoken of as stock in trade; in another it is said that the trustees shall "stand

(a) *Quere*, whether "*real*" is not the word here meant to be used.

(b) See also *Drybutter v. Bartholomew*, 2 P. Wms. 127. Per Hardwicke, C., in *Lord Stafford v. Buckley*, 2 Ves. sen. 182.

seised" of it, which would apply to realty.] The calling the property stock in trade will not make it the less realty ; and there is nothing in the nature of the trust to show that it was not realty in fact. [CRESSWELL, J. No doubt the property is realty ; but the question is, what interest the parties took in it.] The case finds that each shareholder enjoyed his property by bringing his cloth to be fulled at the mill. [ERLE, J. Might not a deed be so framed as to avoid certain liabilities attached to the possession of realty, such as serving as a juror or an overseer : as if a party wished to lay out money in a trade which required the occupation of land ; could he not make the purchase in such a way as to avoid these liabilities ?] It is submitted that he could not. All the liabilities incident to realty must attach to an interest in realty. [CRESSWELL, J. No doubt a party cannot hold realty and say he holds it as personalty, and so avoid these liabilities.]

*212] There are several cases collected in Collier on Partnership (a) to *show that the fact, of realty being held in partnership, makes no alteration in the nature of the property.

Hildyard, in reply. There is no question that if partners hold realty, and it is entered in their books as partnership-property, it may be so considered for certain purposes.(b) What is contended for on the part of the appellant is, that where land is vested in certain parties as trustees, and, by a subsequent deed, the trust is declared that the profits shall be paid to certain other parties, these latter have no interest in the land. Suppose one of the partners in this mill had died intestate, would his share in the property have gone to his heirs or his executors? [CRESSWELL, J. That comes round to precisely the same question.] It is assumed on the other side that the shareholders have an estate in land, and it is argued from that assumption that they cannot divest themselves of the incidents attached to realty. [MAULE, J. The fact of the declaration of trust not being contemporaneous with the conveyance to the trustees, will make no difference, if the trust was created and the shareholders took an equitable estate under the conveyance.] There is nothing in the case to show that the trust was created by the conveyance. [MAULE, J. Then who would have the vote? The trustees?] Probably they would, if they had a beneficial occupation. But that is a very different question. The shareholders have no particular privileges over the rest of the public, as they must pay for the use of the mill. *Cur. adv. vult.*

TINDAL, C. J., now delivered the judgment of the court.

*213] In this case thirty-seven persons claimed the right of *voting for the west riding of the county of York in respect of a qualification described upon the list as "freehold shares in a mill, houses and land." The revising barrister found, that the amount of the shares possessed by each of the claimants in the real property of the company was sufficient to confer a vote, provided the interest acquired by such shares could be considered as an *interest in real property*. The objection taken before him

(a) See pages 68 to 80.

(b) See *Phillips v. Phillips*, 1 Mylne & K. 663.

was, that the interest acquired by the several claimants, as the owners of such shares, was an interest in *personalty* only, and not in *land*; but the revising barrister overruled this objection, as well as another which applied solely to the cases of two of the claimants, Bateman and Brookbank, (to which objection we shall afterwards advert,) and allowed the votes of all the claimants. And we are of opinion that the revising barrister was right in his decision, and that the votes of the several claimants ought to be allowed.

That the claimants took no *legal interest* in the real property, is placed beyond doubt. The freehold land, purchased with the money contributed by the several claimants and by other shareholders, was conveyed to trustees "unto and to the use of them, their heirs and assigns, absolutely:" the trusts subject to which the trustees were seised, being declared by the copartnership-deed subsequently executed by the trustees and the several members of the copartnership thereby created. The only question therefore is, whether the claimants take such an *equitable interest* in the realty as will, by law, give them the right to vote; for under the provisions of the 7 & 8 W. 3, c. 25, the 18 G. 2, c. 18, the 2 W. 4, c. 45, and the 6 & 7 Vict. c. 18, a person seised in equity will have the same right to vote as if he had the seisin in law, of a freehold estate of the value of 40s. by the year, according to the provision of the statute 8 Hen. 6, c. 7.

*And the ground on which we consider these claimants to have such right, is this, that the property of which the trustees are seised in trust for the benefit of the shareholders who form the copartnership, is freehold land; that the copartners by their committee are in possession thereof; that the trusts declared by the deed are no more than agreements and regulations, entered into between the copartners for the better carrying on their joint trade by the means of such land and the mill erected thereon, and are not trusts which are inconsistent with an equitable seisin of the freehold in the copartners; and, lastly, that it is found by the revising barrister that the amount of the shares of each of the claimants in the real property of the company is sufficient in value to confer a vote. [*214]

It is undoubtedly true, as was urged at the bar, that the trusts declared by the copartnership-deed are such as that a court of equity would deal with the real property as *personalty*, so far as was necessary to carry the intention of this trading copartnership into execution. In general, there can be no question but that for all purposes necessary to effectuate the intention of the parties, personal estate may be considered as real, and real estate as personal, by a court of equity; as in the ordinary instance of money agreed or directed to be laid out in land; (a) and so, in the instance of a real estate under an absolute trust or direction to sell; and against this general rule our decision in the present case will not in any manner mili-

(a) In the case of money bequeathed upon trust to buy Greenacre, in the parish of A., in the county of B., for C., it could not be contended that by the mere bequest, C. has a freehold in A.

tate. But, notwithstanding this acknowledged doctrine of the court of equity, no one can deny that the land still remains land, and nothing else. *215] and there is no authority or decision that *for the collateral purpose of giving a vote, which has no bearing upon or reference whatever to the objects of the deed of co-partnership, the right of the *cestui que trust* should not remain just as it would have been without such declaration of trusts. For, as to the declaration by the copartners in the deed, "that the lands and buildings shall be deemed and considered as or in the nature of personal estate, and not real estate," we think the generality of these words must necessarily be limited by the subject-matter of the trusts, declared by the deed, and that they can extend no further than the object and purposes of the deed require; and further, we think it may be considered as a very doubtful question whether the private agreement of parties, or any authority, short of that of an act of parliament, can deprive the owners of the freehold of the right of voting for a member of parliament, which is a right inherent in the owners of the freehold, not for their own benefit, but for that of the community of which they form a part. But, however that may be, it appears to us such right is left altogether untouched by the objects and purposes for which the trusts of the deed now under consideration are created and declared. This deed declares no trust whatever of the freehold; but, as it appears by the statement of the case that the land was purchased with the money of the several shareholders or copartners, it follows that under the purchase-deed there was a resulting trust as to the fee-simple and inheritance for their benefit; so that each of them would be entitled to a share in the beneficial interest therein, proportioned to his share of the purchase money. The partnership deed does not alter the proportions in which the parties are interested; nor does it confer on any stranger any portion of the interest in the land; it only regulates the mode in which the property shall be managed and enjoyed, according to the *216] quantity of interest of each *shareholder therein. And the estate, to use the language of Lord ELDON, in *Crawshay v. Maule*, 1 Swanst. 521, when speaking of a freehold estate purchased by a partnership for trading purposes, "though personal in enjoyment," is "freehold in nature and quality;" and it is to the nature and quality of the estate we are to look, and not to the mode of enjoyment, when we have to decide whether it confers a vote.

It was objected on the part of the appellant, that the case of *Bligh v. Brent*, 2 Yo. & Coll. 268, was an authority against the claimants, inasmuch as it proved that the shares of a company, the profits whereof were derivable from land, were personal property, not real. But we think it sufficient to advert to a broad ground of distinction between that case and the present. In the case referred to, the company, that of the Chelsea water-works, was a corporation created by act of parliament and charter from the crown, of which the individual shareholders were corporators. The whole of the real property was vested in a corporation aggregate, whc

had the sole management and control thereof, having power to convert it into personalty, or back again into realty, at their free pleasure; the individual corporators having, as individuals, no more interest in the freehold than perfect strangers, and no interest in the surplus profits of the concern, until they actually arise. In the present case, the freehold is in the trustees for the benefit of the individual copartners in a trade, to be managed and conducted by a committee appointed by themselves. In many other cases of shareholders in joint-stock companies, where the company has been incorporated by act of parliament, the legislature has expressly declared that the "shares be deemed personal estate, and transmissible as such, and not of the nature of real *property." Such was the case of *The Vaux-* [*217
hall Bridge Company, 1 Gl. & Jam. 101, and of *The Lancaster Canal Company*, Mont. & Bligh, 112, and others; in which cases it may well be conceded, that there could be no freehold interest in the several shareholders so as to entitle them to vote; whereas, in the case before us, there is no other than a voluntary declaration by the parties themselves, that the real estate shall be considered as personal.

Upon the principle, therefore,—that land and mills built thereon are the basis and subject-matter of the trade out of which the profits arise, which are to be distributed amongst the shareholders; that the trusts relate only to the management and conduct of the land and mills, and the trade carried on by means of the same; that there is no trust declared which is inconsistent with an equitable interest in the freehold in the respective shareholders; that the copartners are, by their committee, in possession; and, lastly, that the value of each man's share is sufficient to enable him to vote;—we think the shareholders had an equitable seisin (a) in a sufficient estate to enable them to vote for the county.

As to the objection raised against the right of the two particular claimants, Bateman and Brookbank, we see no ground whatever for considering money borrowed by the trustees on bonds and notes, (b) as having the effect of mortgages on their shares; and, indeed, this objection was little relied upon in argument.

On the whole, we think the decision is right, and that it ought to be

Affirmed.

(a) *Antè*, 48.

(b) *Suprà*, 200.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,

IN
Hilary Vacation,

IN THE SEVENTH YEAR OF THE REIGN OF VICTORIA.

The judges who sat in banco in this vacation were,

TINDAL, C. J.
ERSKINE, J.

MAULE, J.
CRESSWELL, J.

MILLS *v.* LADBROKE. *Feb. 12.*

By an indenture between A. and B. of the first part, C. of the second part, the several persons whose names and seals were thereto affixed, as shareholders of a certain company then about to be formed, of the third part, and certain other persons of the fourth part,—reciting that A. and B. were possessed of a certain colliery, for the residue of a term of 42 years, with full powers for working, &c., and had proposed to divide the colliery and works into eighteen shares of 4000*l.* each, and that they had agreed to sell, and the several persons parties thereto of the third part had agreed respectively to purchase, so many of the shares respectively as were set opposite their respective names, amounting altogether to fifteen shares therein, at the said price, the other three eighteenth shares being retained by A. and B., and that each of the parties thereto of the third part had paid 1000*l.* for each share—each of them A. and B. *severally covenanted with each of the parties thereto of the third part*, their executors, &c., (*inter alia*,) that they would produce and show a good title to the term, that they would effectually assign the same, and that they would, within a certain time, complete certain specified works. *Held*, that the covenant by A. and B. was a several covenant with each of the parties to the indenture of the third part, each covenantee having such a separate interest in the subject-matter of the covenant as to enable him to sue alone upon the covenant.

COVENANT. The declaration stated that, theretofore, to wit, on the 18th of March, 1839, by a certain memorandum of an agreement indented then *219] made between one Robert Arthur Fitzhardinge Kingscote and Thomas Browne of the first part, Henry Kingscote of the second part, the several other persons whose names were thereunto subscribed and seals affixed, as shareholders of a certain company then about to be formed, (and amongst others the plaintiff,) of the third part, the said Henry Kingscote, the plaintiff, and one — Murray of the fourth part, after reciting, amongst other things, that, under or by virtue of certain articles of agreement, bearing date the 2d of January, 1837, made between Charles Molloy,

for and on behalf of the Countess of Newburgh, of the one part, and the said T. Browne, on behalf of the said R. A. F. Kingscote and others, on the other part, (a copy of which said articles of agreement was annexed to the said indenture,) the said R. A. F. Kingscote and the said T. Browne were possessed of, or otherwise well entitled to, the collieries, coal-mines, and seams of coal, within and under the manor, land, and grounds of the said Countess of Newburgh at Amble, Hauxley, and Togston, in the parish of Warkworth, in the county of Northumberland, or elsewhere in the said parish, in the said articles of agreement stated to be computed to be upwards of 2000 acres in extent, but then ascertained to be upwards of 2600 acres in extent, for the residue of a certain term of forty-two years from the 1st of January, 1837, with full powers for working the said coal-mines, and rights of wayleave and erecting staiths or shipping-places, and other powers, licenses, and authorities in the said *articles mentioned, at and under the yearly and other rents and services therein reserved or mentioned ; and that the said R. A. F. Kingscote and the said T. Browne had sunk pits, laid down railways, erected staiths, and had opened and commenced winning and working the said colliery, and that the said R. A. F. Kingscote and the said T. Browne had opened and won one seam of coal, at the depth of twenty-three fathoms or thereabouts, of the thickness of six feet six inches or thereabouts, and had also at the depths of fifty-six fathoms, and seventy-three fathoms, or thereabouts respectively, bored to and ascertained the existence of two other seams, of four feet two inches, and four feet ten inches, or thereabouts respectively ; and that an act of parliament had been obtained in the first year of the reign of Queen Victoria, for forming a harbour in the parish of Warkworth, in the county of Northumberland, by improving the navigation of the river Coquet, and for rendering the same safe and commodious, and easy of access, and which harbour was about forthwith to be made by the commissioners therein named ; and that a report had been obtained from Sir John Rennie, dated 1st of March, 1838, upon the said harbour, and two plans marked No. 1 and No. 2 respectively, and specifications and estimates of and for the same respectively, which plan No. 1 had been adopted and approved by the said commissioners, and a copy thereof, and copies of the report and specification and estimate, were annexed to the said indenture ; and that the said R. A. F. Kingscote and the said T. Browne had proposed to divide the said colliery and works into eighteen shares of 4000*l.* each, and that they had agreed to sell, and the said several persons parties thereto of the third part (the said plaintiff being one of such parties) had agreed respectively to purchase, so many of the shares *respectively as were set opposite their respective names, amounting altogether to fifteen shares therein, at the said price, the other three eighteenth shares being retained by the said R. A. F. Kingscote and the said T. Browne ; and that such purchase had been contracted to be made upon the terms, conditions, guarantees, covenants, declarations, and provisions thereafter mentioned ; and that each

of the parties thereto of the third part (the plaintiff being one of such parties) had paid the sum of 1000*l.* for each share, each of them the said R. A. F. Kingscote and the said T. Browne did thereby, in consideration of the sum of 1000*l.* per share, making together the sum of 15,000*l.*, so paid as aforesaid, the receipt whereof was thereby acknowledged, and of the further sum of 3000*l.* per share, to be paid as thereinbefore mentioned, making together the further sum of 45,000*l.*, for himself, his heirs, executors, and administrators, severally covenant and agree with each of the said parties thereto of the third part, (the plaintiff being one of such parties,) their executors, administrators, and assigns; and each of the said parties thereto of the third part did thereby, for himself, his heirs, executors, and administrators, and for and in respect of the share or shares so set opposite his name or names as aforesaid, covenant and agree with the said R. A. F. Kingscote and the said T. Browne, and each of them, their executors, administrators, and assigns, amongst other things, in manner following, *videlicet*: first, that the said colliery, coal-works, and premises should be divided into eighteen shares of 4000*l.* each, and each of the said parties thereto of the third part (the plaintiff being one of such parties) should be possessed of and interested in the same, and all the gains and profits thereof, to the extent of the share or shares so set opposite his name as aforesaid; secondly, that the said R. A. F. Kingscote and the said T. Browne should produce and show a good and marketable title to the said term of forty-two years, and the said seams of coal and premises, and the liberties, powers, authorities, and licenses demised and granted or agreed to be demised and granted by or mentioned in the said articles of agreement, and to the said colliery, pits, erections, buildings and works, staiths, and shipping-places upon the said Coquet harbour, then made, or to be made as thereafter covenanted and provided for, upon the premises so agreed to be demised as therein aforesaid, and also to good and sufficient railroads and rights of way and access to the said shipping-places; and should and would effectually assign, assure, and vest the same according to the true intent and meaning of the said indenture; and also, that, if the said Lady Newburgh should be induced to grant any extension of the said term of forty-two years, the benefit of such extended term should belong to the several parties thereto according to their said several shares; thirdly, that the said R. A. F. Kingscote and the said T. Browne, their executors or administrators, should and would forthwith and with all practicable speed proceed with, and within twelve calendar months from the first of May then next, well and effectually complete the opening to and winning of the said second and third seams of coal, with sufficient pits, drifts, and all other necessary workings and openings sufficient for the working and getting from the said third seam 50,000 Newcastle chaldrons of large marketable coal, exclusive of small coal per annum equivalent to — tons, with all the necessary pumping and other steam-engines, machinery, and apparatus, horses, carriages, wagons, railroads, and ways, staiths, and shipping-

places, sufficient for draining the said works, and for lifting, conveying, and shipping the said *quantity of 50,000 Newcastle chaldrons per annum, and workmen's cottages, stables, houses, buildings, and [*223 erections, and generally all the plant and establishment sufficient and proper for a colliery with an annual get and vend of 50,000 Newcastle chaldrons of such coal as aforesaid, in good and sufficient order, repair, and condition; fourthly, that the said R. A. F. Kingscote and the said T. Browne should and would forthwith lend and advance, or cause and procure to be lent, to the commissioners for making the said Coquet harbour, sufficient moneys for the making and completing of the said harbour, and all the works thereof, in all respects according to the said plan No. 1 and specification of Sir John Rennie: and the said R. A. F. Kingscote and the said T. Browne did expressly covenant as aforesaid, that the said harbour and works should be forthwith proceeded with, and *bonâ fide*, and with all practicable speed, completed and perfected, according to the said plan and specification, and that the same should be finished within four years from the date thereof at the latest; sixthly, that each of the several parties thereto of the third part should and would pay the further or remaining sum of 3000*l.* for his share, or each of his shares, if more than one, in the manner and at the times following, that is to say, the sum of 1000*l.* on the day after the date thereof, the further sum of 1000*l.* on the 1st of June then next, and the further sum of 1000*l.* when and so soon as the colliery works should be fully completed according to the true intent and meaning of the third article or covenant, and the harbour made and completed according to the said fourth article or covenant; and, that if default should be made in the payment of any of the said instalments on any of the days appointed therefore, the same should bear interest until paid, at the rate of 5*l.* per cent. per annum: provided, and it was thereby expressly declared and agreed, that the said instalments therein mentioned *to be payable on the 1st of June then [*224 next should not be then payable unless in the mean time the said R. A. F. Kingscote and the said T. Browne should have *bonâ fide* and effectually, by themselves or such commissioners as aforesaid, proceeded with the said coal-works, &c.

The declaration then alleged that, afterwards, to wit, on the 22d of March, 1842, by a certain deed endorsed on the said indenture, and then made between the said R. A. F. Kingscote and T. Browne, of the first part, Robert Ladbroke the defendant, of the second part, the several persons whose names were thereto subscribed, and seals affixed, together with one Arthur Eden, of the third part, and the said Henry Kingscote, the plaintiff, and the said T. L. Murray, of the fourth part, after reciting, among other things, that the said R. A. F. Kingscote was desirous of being released and discharged of and from all further liability under his covenants and agreements in the said indenture of the 18th of March, 1839, contained, and to substitute in his place Robert Ladbroke the defendant, who had

agreed to take upon himself the obligation and burden thereof; and that the term of forty-two years had then agreed to be extended to the term of forty-three years, to be computed from the 1st of January, 1839,—it was by the said deed so endorsed witnessed, that the defendant did thereby, for himself, his executors and administrators, covenant and agree with the several parties thereto of the third part respectively, and their respective executors, administrators, and assigns, that he, his heirs, executors and administrators, should and would in all respects perform, observe, and fulfil all the covenants, articles, and agreements in the said indenture of the 18th of March, 1839, mentioned, and discharge and satisfy all the duties, obligations, liabilities, and claims whatsoever in respect thereof, or by reason of any past, existing, or future breach thereof, in the place and
 *225] stead of the said R. A. F. Kingscote, and in such and the like manner to all intents and purposes as the said R. A. F. Kingscote then was, or his heirs, executors or administrators, would be liable to do but for the release thereafter contained, and as if the name of him the defendant had been originally therein inserted instead of the name of the said R. A. F. Kingscote; in consideration of which covenant of the defendant, the said parties thereto of the third part respectively (each for himself, his executors and administrators) had acquitted, released, and discharged, and did thereby acquit, &c. the said R. A. F. Kingscote, his heirs, executors and administrators, of all the therein written covenants, articles, and agreements on his part to be fulfilled and observed, and all duties, obligations, and liabilities, and claims for compensation or damages in respect thereof, and all other claims, actions, suits, and demands whatsoever for or in respect thereof; provided always, and it was thereby by the said T. Browne and Henry Kingscote expressly covenanted, agreed, and declared, that the said release of the said R. A. F. Kingscote should not in any way operate as a release to them, or either of them, of any such covenant, article, or agreement, duty, obligation, liability, or claim, but they should respectively be and remain liable at law and in equity, to all intents and purposes, as if no release had been made, and they respectively should not plead, aver, allege, or set up, or in any manner avail themselves of such release in any court of law or equity in discharge or diminution of their respective liabilities.

The declaration then alleged, that, after the making of the indenture, and before the commencement of the suit, to wit, on the several days and times appointed for the payment thereof, the plaintiff, in pursuance of the covenant in the said indenture contained, paid the further sums or instalments of 1000*l.* and 1000*l.*, making in the whole the sum of 3000*l.*, for
 *226] and on account of one of the said shares of and in the said colliery and the said works: and, that although the plaintiff had in all things kept, performed, and fulfilled the covenants in the said indenture contained on his part and behalf to be performed and fulfilled, yet the de-

defendant had disregarded his covenant, in this, to wit, that neither the said R. A. F. Kingscote and T. Browne, nor the defendant, did or would, nor did nor would either of them, (although often requested so to do, and although a reasonable time in that behalf had long since and before the commencement of the suit elapsed,) produce or show a good marketable title to the said term of years and the said seams of coal and premises, and the liberties, powers, authorities, and licenses demised and granted or agreed to be demised and granted by or mentioned in the said articles of agreement, and to the said colliery, pits, erections, buildings, and works, staiths, and shipping-places upon the said Coquet harbour then made, and to the said railroads and rights of way and access to the said shipping-places; and did not nor would effectually assign, assure, or vest the same according to the true intent and meaning of the said indenture: but, on the contrary thereof, the said T. Browne and the defendant, after the making of the said last-mentioned deed, when they were then requested as aforesaid, produced and showed a bad and insufficient and unmarketable title to the said right of way and access to the said shipping-places: and that the defendant further disregarded his covenant, in this, that the said harbour and works were not, after the making of the last-mentioned deed, *bona fide*, and with all practicable speed, prosecuted, completed, or perfected, according to the said plan and specification, nor were the same finished within four years from the date of the said first-mentioned indenture, but, on the contrary thereof, the said harbour and works, at the time of commencing the suit, although the period of *four years from the date [229 of the indenture had long elapsed, were wholly incomplete and unfinished. By reason of which several premises the plaintiff not only wholly lost and was deprived of the sum of 3000*l.* so paid by him as aforesaid, but had also been deprived of all the benefits and advantages which would have arisen from the completion and fulfilment of the covenants in the indenture mentioned, and had been put to great expense, amounting &c., in endeavouring to procure such good and marketable title as aforesaid. Proof of the indenture of the 18th of March, 1839, with the deed of the 22d of March, 1842, endorsed.

The defendant set out on oyer the indenture of the 18th of March, 1839, with the agreement therein referred to, of the 2d of January, 1837; and also the deed of the 22d of March, 1842, and pleaded, seventhly, that the plaintiff and the other parties to the first deed, of the third part, by the last-mentioned deed released and discharged R. A. F. Kingscote, his heirs, executors and administrators, of and from all covenants, &c., in the indenture of the 18th of March, 1839.

Special demurrer to this plea, assigning for causes, that it attempted to put in issue matter of law, and did not allege any thing on which an issue in fact could be taken; and that the plea neither confessed nor avoided the cause of action stated in the declaration, nor put in issue any material fact therein alleged, &c. Joinder.

On the argument of the demurrer in Hilary term last, *Talfourd*, Serjt., stated that he did not intend to support the plea.^(a)

*228] *Sir T. Wilde, Serjt., for the plaintiff. The only remaining question is, whether the plaintiff can sue *alone* upon the covenant in the deed of the 18th of March, 1839. R. A. F. Kingscote and T. Browne, being possessed of certain mines for a term of forty-two years, proposed to establish a sort of joint-stock company, and to divide their interest therein into eighteen shares of the value of 4000*l.* each. By a deed of the 18th of March, 1839, made between them of the first part, one Henry Kingscote of the second part, the several persons whose names and seals were thereto affixed (of whom the plaintiff was one) of the third part, and certain persons therein mentioned of the fourth part, each of them the said R. A. F. Kingscote and Browne did *severally covenant and agree with each of the said parties thereto of the third part*, (the plaintiff being one of them,) amongst other things, to produce and show a good and marketable title to the said term of forty-two years of the said seams of coal, &c.; effectually to assign the same according to the true intent and meaning of the indenture; and, within a certain time, to complete certain specified works. And by a sub-
*229] sequent deed, endorsed on the *former, and bearing date the 22d of March, 1842, the defendant covenanted with the parties to that deed of the third part (of whom the plaintiff was one) that he would perform and fulfil all the covenants entered into by R. A. F. Kingscote in the first-mentioned deed, and satisfy all claims by reason of any past, existing, or future breach, in the place and stead of the said R. A. F. Kingscote, and in the like manner to all intents and purposes as the said R. A. F. Kingscote would be liable to do. It is to be observed, that the covenant in the first-mentioned deed is by R. A. F. Kingscote and Browne *severally*, and the covenantees are each entitled to separate and distinct shares in the mines. It would be a perversion of the intention of the parties if each covenantee could not bring a separate action for any breach of contract, but was obliged to join with all the others; for if that were so, any one might release the whole covenant. The only connection among the covenantees is their holding

(a) The following points were marked for argument:

For the plaintiff—that the action was founded on the covenant actually entered into by the defendant himself, which (by reference to the indenture of the 18th of March, 1839) was a covenant by the defendant to do all things which R. A. F. Kingscote would have been bound by his covenant to do at or after the time when the second deed was executed by the defendant; that the declaration assigned breaches after the date and execution of the last-mentioned deed; and that the defendant was estopped from setting up the release of R. A. F. Kingscote in discharge of his own liability.

For the defendant—First, that, as his covenant was intended to be substituted for that of R. A. F. Kingscote, and the covenant of R. A. F. Kingscote was joint, the defendant's was joint also, and was therefore discharged by the release to R. A. F. Kingscote, at least so far as related to the covenant for the completion of the works within four years: secondly, that it appeared that the covenants declared upon were made with other persons as well as the plaintiff; that all the covenantees had a joint interest, and were jointly entitled to sue upon the covenants declared upon; and that the action could not be maintained by the plaintiff alone without showing that the other covenantees were dead; and that the declaration was bad for not containing such an averment.

shares in the same concern ; in other respects their interests are distinct. The nature of a covenant, whether it be joint or several, depends more upon the interest of the parties than the precise language used : thus a covenant, although in terms joint, may be in its effects several. In *Slingsby's* case, 5 Co. Rep. 18 b, it was agreed, that, “ when it appears by the declaration that every of the covenantees hath, or is to have, a several interest or estate, there, where the covenant is made with the covenantees *et cum quolibet eorum*, these words *cum quolibet eorum* make the covenant several in respect of their several interests. As, if a man by indenture demises to A. *Blackacre*, to B. *Whiteacre*, and to C. *Greenacre*, and covenants with them, and *quolibet eorum*, that he is lawful owner of the said acres, &c., in that case, in respect of the said several interests by the said words *et cum quolibet eorum*, the covenant is made *several ; but, if he demises to them the acres [*230 jointly, then these words *cum quolibet eorum* are void, for, a man by his covenant (unless in respect of several interests) cannot make it first joint, and then make it several by the same or the like words, *cum quolibet eorum* ; for, although sundry persons may bind themselves *et quemlibet eorum*,—and so the obligation shall be joint or several at the election of the obligee,—yet a man cannot bind himself to three and to each of them, to make it joint or several at the election of several persons for one and the same cause ; for, the court would be in doubt for which of them to give judgment ; which the law would not suffer, as is held in 3 H. 6, 44 b.(a) There, it appears that one brought a replevin against two persons for an ox, who made several avowries, each by himself in his own right ; and there, by advice of all the justices, both the avowries abated, for the inconveniency, that, if both the issues should be found for the avowants, the court could not give judgment on them *severally* for one and the same thing. Also, the covenantor, in the case at bar, would be divers times charged for one and the same thing ; and therefore the said words *et cum quolibet eorum* are, in such case, but words of amplification and abundance, and cannot sever the joint cause of action.” So, in *Eccleston v. Clipsham*, 1 Saund. 153, 2 Keble, 338, 339, 347, 385, S. C., it was held, that, though a covenant be *joint and several* in the terms of it, yet, if the interest and cause of action be *joint*, the action must be brought by all the covenantees : and, on the other hand, if the interest and cause of action be *several*, the action may be brought by one only. In *Owston v. Ogle*, 13 East, 538, part-owners of a ship having agreed “ each and every of them with the others and each and every of the others,” *that the ship should proceed on a certain [*231 voyage under the exclusive management and control of one of them as ship's husband ; and that, after her return, “ a full account should be made of the said ship and her concerns,” and the neat profits be divided in proportion, after deducting all charges : it was held, that the duty of making out such account was cast upon the ship's husband ; and that, for not doing

(a) P. 3 H. 6, fo. 44 b. As to which case, see 4 Nev. & Mann. 229 (b). And see 5 Mann & RyL 302 (c), 304 (c).

so, and not dividing the neat profits after deducting all charges, within a reasonable time after the ship's return, an action lay against him upon the agreement, by *each* of the part-owners. BAYLEY, J., there said: "If the covenant to account were not several, then the ship's husband showing the account to any one of the adventurers would be an answer to an action for not showing it to any other, and all the others might remain in ignorance of it." So, in *Servante v. James*, 10 B. & C. 410, 5 Mann. & Ryl. 299, a covenant by the master of a vessel with the several part-owners, and their several and respective executors, administrators and assigns,—to pay certain moneys to them, and to their and every of their respective executors, administrators and assigns, at a certain banker's, and in such parts and proportions as were set against their several and respective names,—was held to be a several covenant, upon which each covenantee must sue severally in respect of his several interest, and that they could not maintain a joint action. Here, supposing the covenant to be joint, it is apprehended, that if the covenantor were to produce a good title to one covenantee, then no other covenantee could compel, either at law or in equity, a production to him. The consequence might be that the damage would ensue to one without the others participating in it; for as regards the non-production of a good title, and the non-completion of the works, the injury resulting •232] would not necessarily be the same to all of the *covenantees. In *James v. Emery*, 8 Taunt. 245, 2 Marsh. 195, it was held, that, if the interest of several covenantees be several, they may maintain several actions, although the language of the covenant be that of a joint covenant. GRUBB, C. J., there says: "The principle is well known, and fully established, that, if the interest be joint, the action must be joint, although the words of the covenant be several; and, if the interest be several, the covenant will be several, although the terms of it be joint."

Talfourd, Serjt., (with whom were *Channell*, Serjt., and *Tomlinson*,) *contrà*. This action is improperly brought by the plaintiff alone. The general principle, which is laid down as law in the cases cited, will not be disputed. [MAULE, J. Is it a rule of law, or a rule of construction, whether a covenant is joint or several? If a party chooses to covenant with another person, respecting a subject-matter in which other individuals are interested, there is no rule of law prohibiting him from doing so.] It is, perhaps, more properly a rule of construction, of which the present case is an illustration; for the defendant comes in by way of substitution, and covenants to perform all the covenants entered into by another person. In order to determine whether the covenant is joint or several, the court will look at the nature of the interest in the subject-matter of the covenant. The deed discloses a contract for a partnership. Although it is contemplated that the amount of the interest of the parties may vary, in point of fact and of law they become partners when the undertaking is commenced, participating in the profits, and liable to the losses, of the concern. They would take the lease of the mines jointly, and be jointly responsible for the

payment of the rent, and the performance of the covenants. It [*233
 *never could be intended that each of the shareholders should have
 a separate remedy for every breach of the covenants. The breaches com-
 plained of are substantially two—one, for not showing a good and market-
 able title—the other, for not completing the works contracted for, within
 the specified time. Besides the covenants to which these breaches apply,
 there are covenants for referring disputes to viewers, which viewers must
 necessarily be appointed by the majority of the vendees. (a) [MAULE, J. It
 may be that, in the same deed, there are some covenants which are joint,
 and others that are several.] Here it is of great importance to have the
 power to sue alone, for each share may be split into many portions, and
 may become the property of persons under disabilities, so as to render the
 covenant impracticable. [MAULE, J. Here, if one shareholder should die,
 his share will go to his personal representatives, which shows that the inter-
 ests are distinct. If the shares in the mines are several, it is not neces-
 sary to contend that the interest in the performance of the covenant is
 several, for if the interest in the mine is several, the covenant will be
 several also.] As the covenant is several in its words, it can only be con-
 trolled by making out a joint interest in the covenantees; whereas every
 thing in the deed shows that their interest is distinct.

It cannot be meant by the covenant for production of title that fifteen
 abstracts shall be produced to the different shareholders. The covenant
 would be well performed by producing an abstract to any one acting for
 the whole body. It is evident that one conveyance only is contemplated;
 it cannot be intended that there shall be a separate conveyance of the
 share of each party. The title to the property is one entire thing, in which
 all have the same interest. It is strange if *fifteen actions must [*234
 necessarily be brought. Being first commenced in different courts,
 different damages, and possibly not the same judgment, would be the
 result. It is obvious, on reading the covenant, that there is to be but one
 act of showing a good title and conveying. [MAULE, J. If you look
 at the terms of the first breach, the plaintiff does not complain that a good
 title has not been made out to *him*, but that a title has not been shown to
 the mines. He therefore complains of a breach of the whole covenant.]
Servante v. James and *Eccleston v. Clipsham* are distinguishable from the
 present case. If this had been an action to recover back the sums paid,
 then it would have fallen within the principle of those decisions. It is said,
 that the question is not, what the interest is in the subject-matter, but what
 the interest is in the performance of the covenant: but if that were so,
 every covenant must be held several, for every covenantee has an interest
 in its being fulfilled. Here, the damages must necessarily result to all the
 parties; they are unliquidated; and the damages as to one covenantee
 could not be ascertained without ascertaining them as to the rest.

(a) This covenant, though not stated in the declaration, appears in the deed as set out upon
 oyer.

Sir T. Wilde, Serjt., in reply. Effect can only be given to the obvious intention of the parties by holding the covenant to be several. To treat this as a joint covenant, would be, to put it in the power of the covenantors to defeat the contract altogether. In *Sorsbie v. Parke*, 12 M. & W. 146, it was held, that, where the words of a covenant are *expressly* joint, it will be so construed, although the interest may be several; and *vice versa*: but, where the words are ambiguous in this respect, they may be construed to be joint or several, according to the interest. PARKE, B., there says: *235] "I think the correct rule is laid down by *GIBBS, C. J., in the case of *James v. Emery*, with the qualification stated by Mr. Preston, in the note in Sheppard's Touchstone, 166. That rule is, that a covenant will be construed to be joint or several, according to the interest of the parties appearing upon the face of the deed, if the words are capable of that construction; not that it will be construed to be several by reason of several interests, if it be expressly joint. Suppose there were a covenant with A. and B. *jointly*, that a certain thing should be done by the covenantor; both of those persons must sue. But, where it appears upon the face of the deed that A. and B. have several interests, they must sue separately; for, though the words be *prima facie* joint, they will be construed to be several, if the interests of either party, appearing upon the face of the deed, shall require that construction. That, I take to be the true rule." The object of the courts is, always to give effect to the intention of the parties: nothing is more common than for shares in mines to pass from hand to hand by sale. It is said that many inconveniences will arise if the covenant be held several. As many would be occasioned if it were to be construed joint. The damages to each shareholder would not, of necessity, be the same, for the parties may have different amounts of capital invested in the undertaking. This is clearly not a case of ordinary partnership. Here, the breach as to the non-production of a good title is wisely assigned in the words of the deed. Not to give the parties fifteen abstracts, might deprive fourteen of the power of disposing of their shares. It is submitted that the words of the covenant are several; that it is essential to the interests of the parties that such covenants should be several, for if it were held joint it might be defeated; and that for a breach of it no common rule of damage can be laid down for all, but it would be necessary to enter into the *separate circumstances of each, to ascertain *236] what injury he has sustained. *Cur. adv. vult.*

TINDAL, C. J., now delivered the judgment of the court. The plea in this case having been very properly given up on the part of the defendant, the only remaining question is, whether upon the legal construction of the deed, which is the foundation of the action, the plaintiff can sue alone, upon the covenant contained in that deed. The covenant is in a deed bearing date the 18th of March, 1839, made between Robert A. F. Kingscote and T. Browne of the first part, Henry Kingscote of the second part, the several persons whose names and seals are thereto affixed, as share

holders of a certain company then about to be formed, (amongst whom the plaintiff Mills was one,) of the third part, and certain persons therein mentioned of the fourth part. The defendant Ladbroke was no party to that deed; but, by a certain indenture endorsed thereon, bearing date the 22d of March, 1842, made between Robert A. F. Kingscote and Browne of the first part, the defendant Ladbroke of the second part, the several persons whose names and seals are thereto affixed and one Eden of the third part, and certain other persons therein mentioned of the fourth part, the defendant Ladbroke covenants with the parties of the third part, (of whom the plaintiff is one,) that he would perform and fulfil all the covenants entered into by Robert A. F. Kingscote in the first-mentioned deed, and satisfy all claims by reason of any past, existing, or future breach, in the place and stead of the said Robert A. F. Kingscote, and in such and the like manner to all intents and purposes as the said Robert A. F. Kingscote would be liable to do. The question therefore is, as before stated, whether the *covenant in the former deed, entered into by Robert A. F. Kingscote with the plaintiff Mills, is one upon which the plaintiff can [*237 maintain an action in his own name alone. That covenant, as it appears in the deed set out on oyer, is in this form:—"Each of them the said Kingscote and Browne severally covenant and agree with each of the said parties thereto of the third part, his executors, administrators and assigns;" and again, "each of the parties thereto of the third part doth for himself only, his heirs, &c., and for and in respect of the shares or share so set opposite his name as aforesaid, covenant and agree with Kingscote and Browne." The covenant, therefore, entered into by the defendant, as representing Kingscote with the shareholders, is, in point of form, not a covenant with all the covenantees jointly, but a several covenant with each. And we think this is so clearly the case, that, if the general rule, as laid down by Sir VICARY GIBBS in *James v. Emery*, 8 Taunt. 245, 5 Price, 533, is qualified according to the suggestion of Mr. Preston, in a note to Sheppard's Touchstone, page 166, which was adopted by the court of Exchequer in the case of *Sorsbie v. Park*, 12 M. & W. 146, all reference to the nature of the plaintiff's interest would be unnecessary.

But, assuming, on the authority of the several cases referred to in the argument, that the unqualified rule of law is, that the action shall follow the nature of the interest of the covenantees, without regard to the precise form of the covenant, so that the action must be joint where the interest in the subject-matter of the covenant is joint, and several where the interest of each covenantee is a several interest, we think, upon reference to the deed itself, the plaintiff has such several interest in the subject-matter as will enable him to sue alone on this several covenant. The deed recites that *Kingscote and Browne were possessed of certain collieries for a [*238 term of years under the Countess of Newburgh, and that they had opened and won one seam of coal, and that they had proposed to divide the colliery and works into eighteen shares of 4000*l.* each, and that they

had agreed to sell, and the parties of the third part to purchase, so many of the shares respectively as were set opposite their respective names, amounting altogether to fifteen shares, the other three 18th shares being retained by the said Kingscote and Browne, and that such purchase was made upon the terms, conditions, guarantees, covenants, declarations, and provisions thereafter mentioned; and that each of the parties had paid the sum of 1000*l.* for such shares: and, after such recitals, the covenant then proceeds to bind the covenantors, (amongst other things,) first, to show a good marketable title to the colliery and other premises mentioned in the deed; secondly, that they should effectually assign and assure the same premises; and, thirdly, that certain works referred to in the deed should be *bonâ fide* prosecuted and completed with all practicable speed; upon which three parts of the covenant, the three breaches in the declaration are assigned. Now, the first observation that arises is, that the covenantees were not at that time partners. The deed expressly describes them as "shareholders of a certain company about to be formed." Considering them to stand in that relation to each other, the interest which they had in the subject-matter of this covenant appears to have been strictly and properly a several interest. Each had paid his own separate 1000*l.*, for the purchase of his own separate share, to Kingscote, that is, (under the operation of the endorsed deed,) to the defendant; each, therefore, in case there is no good title made, or no effectual assurance of his share to him, ought to have the right to recover back his own 1000*l.*, or any other damage he can prove he has sustained

*239] by *the non-completion of the sale to him of his own individual shares; which damages, when recovered, are not to go to any joint fund, but to be received for his own individual benefit. The same observation will apply to, and govern the construction of, the last breach in the declaration. And undoubtedly it would be a very inconvenient construction, if we were compelled to hold the action must of necessity be a joint action; for it could not be brought without the consent of the fifteen shareholders, who were not, as before observed, partners, but might be strangers to each other, and who have no authority to compel each other to join: and this further difficulty might arise, if such were the construction, that three of the shares are still retained by the sellers, that is, under the effect of the endorsed deed, by the defendant himself.

Upon the general ground, however, above stated, we think the action rightly brought, and that there must be judgment for the plaintiff.

Judgment for the plaintiff.

*JOHNSON and Others, Assignees of INNES and BRACHER, [*240
Bankrupts, v. EVANS and Another Feb. 12.

Upon a *fi. fa.* on a judgment against A., who is partner with B., the sheriff is bound to *seize* the whole of the partnership effects; but he can only *sell* the moiety belonging to A., the property and possession of the other moiety continuing in B.

On the 22d of November, 1842, a *fi. fa.* issued upon a judgment obtained against A., the partner of B., and on the same day was lodged with the sheriff. On the following day, the officer entered under a warrant granted thereon, and seized the whole of the partnership effects. On the 2d of December, another writ of *fi. fa.* issued upon a joint judgment against A. and B., directed to the same sheriff, who thereupon granted a warrant to different officers. No actual seizure was made under this second writ. On the 7th of December each of the partners committed an act of bankruptcy, and on the 9th a *fiat* issued against them, under which they were duly declared bankrupts. The sheriff afterwards sold the whole of the partnership effects in satisfaction of the two writs:—*Held*, that the sheriff was not justified in selling any part of the goods to satisfy the second writ, such writ not having been served or levied by seizure upon the property of the bankrupts before the issuing of the *fiat*, within the meaning of the 6 G. 4, c. 16, s. 108.

TROVER by the plaintiffs, as assignees of Innes and Bracher, bankrupts, against the defendants Evans and Wheelton, the sheriffs of London, to recover the value of certain property belonging to the bankrupts, which they had seized and sold.

At the trial of the cause before COLTMAN, J., at the sittings in London after last Trinity term, it appeared that on the 22d of November, 1839, a writ of *fi. fa.* issued upon a judgment obtained against Innes alone for 115*l.* 4*s.*, which was lodged with the sheriff on the same day; and, on the 23d, an officer of the sheriff seized the separate effects of Innes, and also the whole of the partnership effects. On the 2d of December following, a second writ of *fi. fa.* issued, upon a judgment obtained against Innes and Bracher jointly, (who had carried on the business of brewers,) for 528*l.* 10*s.* This writ was lodged with the sheriff on the same day, and a warrant was thereon granted by him to other officers; but no actual seizure took place under this second writ. On the 9th a *fiat* in bankruptcy issued against Innes and Bracher, founded upon acts of bankruptcy *committed by each of them on the 7th of that month; under which *fiat* they were duly [*241 declared bankrupts. The sale of the goods took place between the 20th of December, 1839, and the 10th of January, 1841.

For the defendants, it was contended, that, the goods being already seized by the sheriff under the first writ, the second writ attached upon them as soon as it was lodged. A verdict was taken for the plaintiffs, damages 421*l.*, being the value of the goods sold, after deducting the sum paid in satisfaction of the first writ, leave being reserved to the defendants to move to enter a nonsuit or a verdict for them.

Bompas, Serjt., in Michaelmas term last, obtained a rule nisi accordingly; citing *Clerk v. Withers*, 1 Salk. 322; *Heydon v. Heydon*, 1 Salk. 392; *Hutchinson v. Johnston*, 1 T. R. 729; *Jones v. Atherton*, 7 Taunt. 56;

Sawle v. Paynter, 1 D. & R. 307, and *Wintle v. Freeman*, 11 Ad. & E. 539, 1 Gale & D. 93.

Byles, Serjt., (with whom was *Ogle*), on a subsequent day showed cause. It is submitted that there was no execution served and levied by seizure of Bracher's goods previously to the issuing of the fiat. The question depends on the first part of the 6 G. 4, c. 16, s. 108, which enacts "that no creditor having security for his debt, or having made any attachment in London or any other place, by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive upon any such security or attachment more than a rateable part of such debt, except in respect of any execution or extent served and levied by seizure upon, or any mortgage *242] of, or lien upon, any part of the property of such *bankrupt before the bankruptcy." It has been frequently decided that an execution-creditor is a person having security for his debt; and his security cannot prevail against the rights of the assignees unless the execution was served and levied by seizure upon the property of the bankrupt before the bankruptcy, or, since the 2 & 3 Vict. c. 29, before the issuing of the fiat. The words "served and levied by seizure" mean an actual seizure by notorious manual possession, and not a constructive seizure; *Godson v. Sanctuary*, 4 B. & Ad. 255, 1 N. & M. 52; *Whitmore v. Robertson*, 8 M. & W. 463. The question therefore is, what was the effect of the seizure under the first writ, against the goods of Innes alone, whether it operated also as an actual seizure in execution of the goods of Bracher. The duty of a sheriff who has a writ delivered to him directing him to levy on the goods of one or two tenants in common, is merely to seize the share of the debtor in execution. He cannot take the moiety of the other tenant in common; at all events he cannot seize it in execution. The sheriff cannot place himself or his vendee in a better situation than the debtor; and, except as to the right to sell, he is nothing more than a tenant in common. [COLTMAN, J. If the sheriff is no more than a tenant in common, can the other party carry away the goods supposing he may do so without a breach of the peace?] The case of *Heydon v. Heydon*, 1 Salk. 392, is thus reported:—Coleman and Heydon were copartners, and a judgment was against Coleman, and all the goods both of Coleman and Heydon were taken in execution: and it was held by HOLT, C. J., and the court, that the sheriff must seize all, because the moieties are undivided; for, if he seize but a moiety and sell that, the other will have a right to the moiety of that moiety; but he must seize the *243] whole, and sell a moiety thereof, *undivided, and the vendee will be tenant in common with the other partner. No authority, however, is cited for the position that the sheriff may seize all in execution. *Bachurst v. Clinkard*, 1 Show. 173, is a distinct authority that, under an execution against one of several partners, the share only of him against whom the execution issued can be seized. That was an action against the sheriff of Kent for a false return of *nulla bona* to a writ of *fi. fa.* against the goods of one Dyke, and it appeared on the trial that Dyke, Brown, and others, being part-

ners, a *fi. fa.* had been sued out against Brown, and thereon the partnership goods were seized. It was held by *HOLT, C. J.*, that, though the partners had joint and undivided interests, yet only the share or part of Brown, and no more, could be seized upon the execution against Brown's goods, and consequently that Dyke had goods, and so the return was false. The reporter adds in a note, that the point thus ruled by *HOLT, C. J.*, in this case, was resolved in court the day before by him in his argument in another case, and not denied by any of the judges; and he goes on to say: "And I saw Chief Justice *POLLEXFEN*'s opinion, under his hand, upon this occasion, that, on execution against one partner's goods, only his share or part is liable." Suppose the case of a joint-stock bank consisting of 1000 partners, can the sheriff for the debt of one seize the property of the whole firm? In *Jacky v. Butler*, 2 Lord Raym. 871, the court held that on an execution against the goods of one partner, the sheriff could not sell more than a moiety; for the property of the other moiety was not affected by the judgment or by the execution. In *Chapman v. Koops*, 3 B. & P. 289, Lord *ALVANLEY* says: "Where persons enter into partnership, they must be aware that the separate concerns of each partner may, in some cases, introduce a variety of claims *very inconvenient to the general partnership concern. By the law of England, the creditor of any one partner *may take in execution that partner's interest* in all the tangible property of the partnership, and will thereby become a tenant in common with the other partners." In *Holmes v. Mentze*, 4 Ad. & E. 127, 5 N. & M. 563. Lord *DENMAN* says: "The sheriff in this case is called upon to seize goods of the defendant at the plaintiff's suit; but a third party, alleging that the defendant is his partner, requires the sheriff not to act, because the defendant is indebted to the partnership in more than the amount of his share. That does not interfere with the sheriff's duty. He is to sell for such interest as the defendant has as partner, not for the degree of right which he may be found to have on a winding up of the affairs; because, if the sheriff waited till that could be ascertained, the goods might remain unsold for an indefinite time." Cases have been cited on the part of the defendants, to show, that, as between two execution-creditors, the property is bound by the delivery of the writ to the sheriff. That is not disputed. But the question is very different where the right of the assignees are concerned. The case chiefly relied on is *Jones v. Atherton*, 7 Taunt. 56; where it was held, that, if a second *fi. fa.* be delivered to a sheriff after he has the defendant's goods in his possession under the prior *fi. fa.* of another, the goods are bound by the second execution, subject to the first execution, from the date of the delivery of the last writ to the sheriff; and that, without warrant on the second writ, or further seizure. Here, however, Bracher's moiety of the partnership property has never been seized under any writ. [*244]

Bompas, Serjt., (with whom was *Kennedy*,) in support of the rule. As the sheriff was in possession of the whole *of the goods of the partnership under the first writ, the delivery to him of the second writ [*245]

operated as a sufficient seizure under the latter writ, within the intent and meaning of the 6 G. 4, c. 16, s. 108. It has been argued that the sheriff, under the first writ, could only seize a moiety of the partnership effects. A long series of decisions, however, shows that it is his duty to *seize* the whole - the only question has been, as what he is to *sell*. *Heydon v. Heydon*, 1 Salk. 392, and *Jacky v. Buller*, 2 Ld. Raym. 871, are distinct authorities to show that he must seize the whole of the goods. In *Pope v. Haman*, Comberb. 217, Lord HOLT, says: "Upon a judgment against one copartner, the sheriff may *take* the goods of both in execution, and the other copartner hath no remedy at law, otherwise than by retaking the goods if he can." The case of *Bachurst v. Clinkard*, 1 Show. 173, may be reconciled with all the other cases if the word "seized" be read "sold," and would make it consistent with the ruling of the same learned judge in *Pope v. Haman*. [CRESWELL, J. Looking at the whole case, it seems to me that the report is correct as it stands.] In *Eddie v. Davidson*, 2 Dougl. 650, the sheriff having, on an execution against one of two partners, seized and sold the partnership effects, the court referred it to the master to take an account of the share of the partnership effects to which the other partner was entitled, and directed the sheriff to pay his share to his assignees, he having become a bankrupt. In *Morley v. Strombom*, 3 B. & P. 254, and *Parker v. Pistor*, 3 B. & P. 288, the court recognised the validity of a seizure of partnership property on process against one of the partners. The right of the sheriff to seize the whole of the goods is also recognised in *Holmes v. Mentze*, 4 Ad. & E. 127, 5 N. *246] & M. 563. [TINDAL, C. J., referred to *Burton v. *Green*, 3 C. & P. 306, where considerable doubt was entertained by Lord TENTERDEN as to what the sheriff ought to sell.] What the sheriff may *sell* is not material to the present case. Supposing he can only sell an undivided moiety, he cannot even do that without seizing the whole of the goods. Where a party is arrested on a *ca. sa.* he is in the custody of the sheriff with respect to all the writs that have been lodged with the sheriff. In *Frost's* case 5 Co. Rep. 89 a, it was resolved, "that, when a man is in the custody of the sheriff by process of law, and afterwards another writ is delivered to him to arrest the body of him who is in his custody, presently he is in his custody by force of the second writ by judgment of law, although he do not actually arrest him; for, to what purpose should he arrest him who is and was before in his custody? *Et lex non præcipit inutilia, quia inutilis labor stultus*: and the words of the *capias ad satisfaciendum* are, not only *quod capiat*, &c., but *quod salvo custodiat*, &c., *ita quod habeat corpus*, &c. So that, although he cannot take him (whom he has) in his custody, yet he may safely keep him; and therewith agrees M. 7 H. 4, 30 b." So in *Jackson v. Humphreys*, 1 Salk. 273, HOLT, C. J., says: "If the sheriff of Northumberland have a man in custody in Northumberland, and the sheriff is himself here in town, and a writ is delivered to him against that person, he is in his custody immediately upon that writ." *Rose v. Tomblinson*. 3 Dowl. P. C. 55, is to the same effect. Here, the goods being alread

in the hands of the sheriff, he might properly aver that he had seized them under the second writ. In *Hutchinson v. Johnston*, 1 T. R. 729, it was held, that, where two writs of *fi. fa.* against the same defendant are delivered to a sheriff on different days, and *no sale is actually made* of the defendant's goods, the first *execution must have priority, even though the seizure was first made under the subsequent execution. And [*247 in *Sawle v. Paynter*, 1 D. & R. 307, a writ of *fi. fa.* having issued against a debtor at the suit of one creditor, and before it was executed the attorneys of another creditor having in the mean time obtained a warrant upon another *fi. fa.* from the same sheriff, directed to their clerk, and executed it before the prior execution was put in; it was held that the attorneys were liable to the sheriff, (who had made a return that he had levied the money under the first writ, and had in fact paid the amount of the debt to the creditor,) to refund the money levied under the second execution, in an action for money had and received to his use. *Jones v. Atherton*, 7 Taunt. 56, is also strongly in point. Lord DENMAN, in delivering the judgment of the court in *Drewe v. Lainson*, 11 Ad. & E. 529, 3 P. & D. 245, says: "The duty of the sheriff, when he has several writs of execution, is clear. He is to execute them according to their priority; which, as to writs of *fi. fa.*, is according to the time of their delivery to him. By 'executing' is meant that he is to apply the proceeds of goods seized in that manner. It is not material whether he seizes the goods under the first or the last writ: as soon as they are seized, they are, in point of law, in his custody under all the writs which he then has; and when he sells them, he sells, in point of law, under all the writs." It is submitted that here, the delivery of the second writ to the sheriff had the same effect as though he had made a fresh and distinct seizure under that writ. *Cur. adv. vult.*

TINDAL, C. J., now delivered the judgment of the court. The facts out of which the question of law which has been argued before us arises, are these:—The two *bankrupts being partners, on 22d of November, [*248 1842, a writ of *fi. fa.* issued upon a judgment obtained against one of them, directed to the sheriff of Middlesex, which writ was lodged with the sheriff on that day, and a warrant made out thereon to one of his officers, who on the following day entered into possession of the premises in the occupation of the partners, and seized under the writ the partnership effects found therein. On the 2d of December following, another writ of *fi. fa.* issued upon a joint judgment against both the partners, directed to the same sheriff, who upon the same day made out a warrant thereon, directed, not to the same officer who was already in possession, but to other and different officers. Under this second writ of *fi. fa.* no actual entry on the premises in the occupation of the partners, and no actual seizure of the partnership property, was made. On the 7th of December, each of the partners committed an act of bankruptcy; and on the 9th a fiat issued against both, under which they were duly adjudicated bankrupts, after which, the sheriff proceeded to sell, and sold the whole of the pro-

perty, both several and joint, of both the bankrupts, in satisfaction of the two writs which were in his hands.

Upon this state of facts, the question between the assignees of the bankrupts and the judgment-creditor who sued out the second writ of *fi. fa.*, has arisen, whether the sheriff was justified in selling any part of the goods to satisfy the second writ ; in other words, whether the execution upon the joint judgment " was served and levied by seizure upon some part of the property of such bankrupts before their bankruptcy," or, as it may be now taken, since the late statute, " before the fiat issued against him."

On the part of the sheriff it was argued, that, as he had already seized, and was in possession, under the first writ, the bare delivery of the second *249] writ to him had, in law, the same operation and effect with respect to the goods seized as if he had made a second seizure by the same or another officer, so that the second execution was as much served and levied by seizure as if a new and distinct seizure had been made.

On the part of the assignees, it was contended that such constructive seizure did not satisfy the words or intention of the statute, but that there must be an actual seizure, if not by a different officer under a warrant directed to him, yet, at all events, by the delivery of a new warrant under the second writ to the officer already in possession.

The answer to this question will depend, in the first place, on the consideration of the legal effect and operation of the seizure by the sheriff of joint property belonging to several partners under a writ sued out against one of them only, and, in the second place, upon the scope and object of the enactment in the statute of G. 4.

Upon the first point, it is an admitted general rule of law, that the judgment-creditor of any partner may take in execution against that partner, as well his separate property as his share or interest in all the personal property of the partnership that is tangible and capable of being seized : and it is undoubtedly true, that, in order to make, and for the purpose of making, the execution effectual against the share of the debtor partner in the joint property, the sheriff must seize the whole, the shares of the two partners being undivided : for, as it is stated by Holt, C. J., in *Heydon v. Heydon*, 1 Salk. 392, " if he seize but the partner's moiety, and sell that, the other will have a right to a moiety of that moiety ; but he must seize the whole, and sell a moiety thereof undivided, and the vendee will be tenant in common thereof with the other *250] partner." Such seizure of the whole, it is obvious, arises from the necessity of the case ; just as if a man purchases an undivided moiety of a chattel that is indivisible, he cannot in any way take possession of that moiety without taking possession of the whole. But neither in the one case nor in the other does such taking possession of the whole convey any interest or property whatever in the other part-owner's share. It would, indeed, be against reason and justice, if it were otherwise : if it could be held that the sheriff, who is autho-

ized by the writ, of the goods and chattels of the defendant in the action to cause to be made the debt recovered by the judgment, could, by the execution of the writ in any manner whatever affect the interest of that partner who was a stranger to the action, in the goods so seized by the sheriff. The case referred to in 2 Lord Raymond, 871, *Jacky v. Butler*, is a distinct authority, if any were wanting, "that the sheriff, under such seizure, could not sell more than a moiety; for, the property of the other moiety was not affected by the judgment nor by the execution." And this distinction between the property of the two partners in their respective shares in the goods seized under the writ against one, is so well established that, if the sheriff, after seizing the joint effects of A. and B. for the separate debt of A., should receive a writ requiring him to levy for the separate debt of B., he could not return *nulla bona* to this second writ, without rendering himself liable to an action for a false return; *Bachurst v. Clerkard*, 1 Show. 173.

It was even held by Lord HARDWICKE, that, in such cases, the judgment-creditor becomes tenant in common with the other partner; see *Skipp v. Harwood*, 2 Swanst. 586, and also by Lord ALVANLEY, in *Chapman v. Koops*, 3 B. & P. 289. So that, in any way of considering the case, the seizure of the *whole, which is made of necessity, leaves the pro- [251] perty of the solvent partner, and the possession also, which follows the property in chattels, just where it was before, that is, in the solvent partner. And, this being the case, the several decisions which show, that, where the sheriff has entered under a *fi. fa.*, and seized the goods of a defendant, there is no necessity to make a second entry or seizure under a second *fi. fa.* delivered to him against the same defendant, but that, being once in possession, he is in possession as to all subsequent writs, will not apply to the case before us; for, in those instances, it was the separate property of the debtor which had been taken; the sheriff had not only seized the whole, but had seized in order to sell the whole if necessary: the property in the whole, as to the judgment-debtor, had been changed. In such case, therefore, there could be no occasion to make, as there could be no use in making, a second seizure, any more than in making a second caption of the same defendant after the sheriff had taken him in custody under a former writ; the law holding that the sheriff had him presently in custody by force of the second writ, by the mere delivery thereof to the sheriff; as is laid down in *Dalton, Office of Sheriff*, p. 114.

And, such being the nature and character of the seizure of the whole, we think it was not such a seizure as to the other partner's moiety as will satisfy the meaning of the statute; for, we think the statute meant by the words "execution served and levied by seizure upon the goods," a substantial seizure for the purpose of satisfying the execution by actual sale. The seizure of the whole for the purpose of selling a moiety only never could be a levying by seizure out of the other moiety, which are the words of the act. No such serving and levying as to the other partner's share

*252] ever was or could be made in this case, unless the sheriff had *seized under the second writ delivered to him, which in this case he never did ; there never being any actual seizure of the other moiety by a second officer, nor any delivery of a second warrant to the first officer, who was already in possession.

For these reasons, we think that the rule which has been obtained, for entering a nonsuit, must be discharged. Rule discharged

*253] *PARKER v. The GREAT WESTERN Railway Company.

Feb. 12.

By the acts of parliament under which a railway company was incorporated, it was provided, that the charges for the carriage of goods should be reasonable and equal to all persons ; and that no reduction or advance should be made, either directly or indirectly, in favour of or against any particular person.

The company acted themselves as carriers for the public, and they issued certain scales of their charges for carriage of goods, including the collection, loading, unloading, and delivery of parcels. They also carried goods for other carriers, to whom they made certain allowances, as an equivalent for the trouble of the collection, &c., of parcels, such collection, &c., being performed by the carriers. But in their dealings with A., a particular carrier, they refused to make such allowances, but were willing to perform for him all the things which formed the consideration for such allowances.

Held, that the charges to A. were not equal or reasonable.

The company, in their transactions with the public and with carriers, made the following distinction as to their charges for carriage. In the case of the public, if there were several packages from one consignor to several consignees, or from several consignors to one consignee, the charge was upon the aggregate weight. In the case of carriers, if there were several packages for several consignees, the charge was upon the separate weight of each package, unless more than one package belonged to the same consignor, (not being the carrier,) or was going to the same consignee, in either of which cases the charge was upon the aggregate weight. But in such cases the company recognised the carrier only as the consignor and consignee of the goods, the agent of such carrier in fact receiving the goods at the end of the transit.

Held, that the company were bound to treat a carrier as consignor and consignee, for all purposes, including the mode of charging in the aggregate.

Held, also, that A., having paid the extra charges in both of the instances above mentioned, might recover the amount of such payments in an action for money had and received against the company ; such payments not being voluntary, but made in order to induce the company to do that which they were bound to do without requiring such payments.

Acts of parliament which confer privileges upon a company, and profess to give the public certain advantages in return, are to be construed strictly against the company, and liberally in favour of the public.

THIS was an action of assumpsit to recover 1000*l.* as money received by the defendants, to the use of the plaintiff. The defendants pleaded non-assumpsit.

A verdict was taken for the plaintiff by consent, damages 823*l.* 19*s.* 3*d.*, subject to the opinion of the court upon the following case :—

*254] *The plaintiff is an extensive carrier, having his London establishment in New Inn Yard, Old Bailey, and his several other establishments at, near, or within twenty-two miles of, the various stations on the Great Western railway. The defendants are The Great Western Railway Company mentioned in and incorporated by the statute 5 & 6 W. 4,

c. cvii., for making a railway from Bristol to join The London-and-Birmingham railway, near London, to be called The Great Western railway, with branches therefrom to the towns of Bradford and Trowbridge in the county of Wilts, and mentioned in the several subsequent acts of parliament relating to The Great Western railway, viz., the 6 W. 4, c. xxxviii., the 1 Vict. cc. xci., xcii., and the 2 Vict. c. xxvii., all of which are to be referred to as part of this case.

The said company, some years since, completed the whole line of railway mentioned in their acts of parliament, and have, from the time of the completion of the said railway to the present time, not only carried passengers thereon, but have also, during all that time, been common carriers thereon of cattle, goods and merchandise of all kinds from Paddington to Bristol, and *vice versa*, as also from and to all the intermediate railway stations, including the several intermediate railway stations or places hereinafter mentioned, making certain rates or charges for the carriage and conveyance of such things as aforesaid.

The company have ever since the opening of their said railway been the only carriers upon the same, and have always supplied both the carriages in which persons and things have been carried, and also the locomotive engines whereby such carriages with their contents have been moved along the said railway, and have always conducted and managed such engines and carriages by their own servants. No person, other than the company, has ever had any locomotive engines, or other *moving power, in operation on the said railway, or any carriages or vehicles for the conveyance of goods or passengers; nor has any other person ever conducted or driven any engine or carriage upon the said railway. [*255]

The company have, ever since the opening of their said railway, been in the habit, as common carriers, of carrying goods thereon to and from the different railway stations, not only for the public at large, by which is meant persons not themselves in the carrying trade, but also for persons being (like the plaintiff) carriers by trade themselves; and all the goods herein-after mentioned to have been carried by the company for the plaintiff, were carried by them as such common carriers on their said railway.

The company, from 1841 to the present time, when employed to carry goods on their railway for the public at large, have always, by their own servants, performed the loading and unloading of the goods for the public, without making any extra charge for the same beyond the charge for carriage. By the loading and unloading of the goods is meant, unloading the goods from any vehicle in which they may be brought to the company's respective stations, and loading them on the company's trucks in which they are conveyed on the said railway, also the unloading of the goods from off the trucks when arrived at the station of delivery or journey's end on the railway, and the reloading of them upon any vehicle waiting, or coming, there to carry the same away.

The company and the carriers have always during the times aforesaid.

when the former have been employed to carry goods for the latter, proceeded as follows:—The carriers have performed the above loading and unloading by their own servants, with the assistance of the company's servants; and, accordingly, the plaintiff, as a carrier in common with the rest *256] of the carriers for whom the company have carried goods, has on every occasion, during the times aforesaid, when the company have carried goods for him on their railway, performed the loading and unloading of the goods by his own servants and those of the company, as aforesaid: and, in order to be able to assist in such loading and unloading at the several stations on the railway, to and on which the plaintiff and the other carriers have, during the times aforesaid, been in the habit of sending goods by the said railway, the plaintiff and the other carriers, during the times aforesaid, have been obliged to keep and have separate establishments of clerks and servants at each of such stations, viz., in the plaintiff's case, at the several stations at Paddington, Steventon, Cirencester, Bristol, Bath and Farringdon Road, each of which establishments of servants and clerks has been of considerable and constant expense to the plaintiff and other carriers, as aforesaid.

The collection and delivery in London and the towns on the line of railway of small packages, that is to say, of packages under 2 cwt., has been conducted as follows:—By "collection" is meant this: that the company's stations being generally situate in the outskirts of the towns on the line of railway, it becomes necessary to collect the goods in the towns and carry them by some conveyance to the company's stations in the outskirts before they can be conveyed on the railway. Thus, the company's station at Paddington being nearly four or five miles from the central parts of London, collection in London consists in sending carts and men round to various parts of London, and then taking up any packages of goods required to be carried by the company, and so carrying the said goods from the places where taken up, through the public streets to the company's railway station at Paddington; and the like at the other towns on their line of railway. By *257] "delivery" is meant, when packages have arrived at their journey's end on the railway, the taking of them in carts and wagons or other vehicles, from the railway station, through the public streets, to the places to which the same may be addressed in the town adjoining such railway station, and there delivering them.

From the year 1841 to the present time, the company, when carrying goods for the public at large, not carriers, have performed the collection and delivery, and made no charge in respect of collection or delivery in addition to their ordinary charge for carriage as set forth in their printed bills, provided the packages so carried did not exceed 2 cwt. each; if above 2 cwt. each, the company have made an extra charge for such collection and delivery.

The company, for the purpose of performing the collection and delivery of such goods as the public required them to collect and deliver during the

period in question in this case, employed one Sherman, himself a common carrier, to do that service, with his servants, horses and carts, and paid him large sums of money for the collection and delivery of parcels.

During all the said period, the company and the carriers, when the latter have employed the former to carry goods for them, have proceeded as follows:—The carriers (and the plaintiff among them) have performed, by their own horses, servants and vehicles, the collection and delivery of such goods, of whatsoever weight the packages may have been.

It is to be observed that the carriage of packages of, and under, 2 cwt. forms the most lucrative part of the business of a carrier, and that such packages are far more numerous than those of a greater weight.

When goods are brought to the company's station to be carried by them, it is necessary, in order to ascertain the amount to be charged by the company for carriage, that the weight of the goods should be ascertained; and, *when the public have brought goods to their stations to be carried, [*258 the company have always, by their own servants, done, or been ready and willing to do, the weighing of the goods for the public, free of any charge, in addition to the ordinary charge for carriage, so as to ascertain the amount payable for carriage; but the carriers who have brought goods to the company's stations to be carried by the company, and the plaintiff as one of them, always have done the weighing of the goods by their own respective servants, and at their own expense, and at their own respective warehouses, or places, and not at the company's stations, or with the company's scales, although the company have always been prepared with the means of checking such weights by their own scales and servants where the correctness of them was doubted: and by this means the company have been saved considerable additional expense and trouble, which would have been requisite if the company had had to weigh the goods brought by the carriers.

When goods carried on the railway by the company have arrived at the end of the journey on the railway, the company, during the period in question in this action, have been in the habit of allowing the goods, if carried for the public at large, to be warehoused, free of charge, for two days, and, in some cases, for several weeks, in the company's premises at the station of arrival, until the consignees have found it convenient to take them away; but, when the goods carried by the company have been so carried by them for carriers, (for instance, for the plaintiff,) the company have refused to allow them or him to warehouse the same in the company's premises, for any time at all.

The company have always been the sole carriers on the railway; and all the trucks, carriages and locomotive engines employed thereon, have always belonged to them, and been worked, moved and conducted by their *servants; so that the company have never made one rate, toll or [*259 charge to the public, or to the carriers, for the use of the railway, and another rate, toll or charge for the use of the locomotive engines or

power; nor have they made any separate rate for the conveyance of goods on the railway by the company in addition to the two last-mentioned rates, but the company have always charged the public and the carriers one single rate or charge.

The charges made by the company for the carriage of goods on the railway have been governed by printed bills and a scale-book issued and published by the company from time to time. (Certain printed bills and a scale-book marked respectively from A. to H. consecutively, and signed by the respective attorneys, were referred to, as if set out in the case, and the periods when the respective bills were issued were set forth.) Each of the bills was in force from the time of its issuing until the period when the next succeeding one is above stated to have issued, and the last-dated bill until the commencement of this suit. The scale-book was issued in May, 1841, and remained in force from that time until the commencement of this action.

The company have, during the time in question in this action, allowed the carriers, on all goods carried by the company on their railway for the carriers, a deduction or discount, equivalent to 10 per cent., from the rates charged to the public, as set down in the said bills and scale-book; such deduction being made at the time when the carrier paid the company for the carriage of the goods. This discount, or deduction, of 10 per cent. on the company's rate of charge to the public, has been allowed by the company to all carriers who have employed the company to carry goods on the railway, and who have not been charged by the company with concealing, *260] or making false declarations as to, the contents *of packages transmitted by the railway, or with otherwise infringing the regulations of the company.

The loading, unloading, and weighing of goods carried by the company on the railway for the carriers, and the preparation of the ticking-off notes and of the carrier's declaration-ticket hereinafter mentioned, are a reasonable equivalent for the allowance of 10 per cent.

The company's practice appears to have been, to compensate the carriers for damage occasioned by the improper stowage of their goods with those of other people, but not to compensate the carriers for damage occasioned by the improper stowage of the carriers' own goods *inter se*. The sum of 30s. appears to have been paid to the plaintiff for damage occasioned by improper stowage, during the time in question in this suit.

The company, until May, 1841, allowed the carriers to send by the railway small parcels and packages of any weight,—if goods of one and the same class,—at the same rate per ton, or for less than a ton, as heavy or large packages; the public, during the same period, were charged as stated in the two first-dated bills, as follows: that is to say, “An extra charge per ton is made for small quantities of goods; of which particulars may be had, on application.” The above sentence applies to packages of less than a ton. By reason of the above privileges, the plaintiff and the other car

ners who have employed the company to carry goods on the railway, were enabled to charge the public as low as, or lower than, the company for the carriage of goods by the railway, and still to get a profit.

On the 31st of May, 1841, the company issued the bill of charges marked C, for the carriage of goods; and from that day until the 30th of June following, the carriers were placed by the company on the same footing as the public in respect of the company's charges for the *carriage of small parcels and packages not exceeding 2 cwt. [*261

The company, on the 30th of June, 1841, issued the bill of charges marked D, in which they stated that an extra charge of 2d. per lb. would also be made, in addition to the regular rates of carriage, for the conveyance of all packages of whatever description forwarded to, from, or on account of carriers, innkeepers, warehousemen, or wharfingers, which might contain separate parcels addressed to, or intended for delivery to, other persons than the consignee of such packages, whereby the company would be deprived of their just and lawful scale of charges by means of such packing together, or concealment, of small parcels. The company have repeated the above announcement contained in the said bill marked D, in every subsequent bill of charges published by them, and have acted upon, and enforced it from June, 1841, down to the present time, by charging the extra 2d. per lb., in addition to the regular rates of carriage, upon all packages carried by the company on their railway to, from, or on account of, carriers, which have contained separate parcels addressed to, or intended for delivery to, other persons than the carrier's consignee of such package.

The aforesaid announcement in the bill of charges marked D, was made and acted on by the company, in consequence of having discovered that there had been a practice, by some carriers, of packing many small parcels or packages, each under 2 cwt., in one hamper or case, and making each of such Hampers or cases exceed 2 cwt., and addressing such hamper or case to an agent of the carrier at the terminus of the journey on the railway, to which agent the company were employed by the carrier to deliver such hamper or case; and such agent, after receiving it, delivered the separate parcels or packages contained in it to the several persons to *whom [*262 such parcels were directed; thus depriving the company of the benefit of their printed scale of charges, secondly set forth in the bill marked C, and bringing such parcels within the printed scales respectively applicable to parcels above 2 cwt.

The company have enforced this extra charge against various carriers, upon packages containing separate parcels as aforesaid, in cases in which such package carried on the said railway by the company for a carrier, has been delivered to one person only, namely, to the agent of the carrier, at the station of delivery at the end of the journey. The company have always refused to recognise any other consignee of such package, or of any parcel therein contained, than such agent of the carrier, or to deliver such package, or any part of the contents thereof, to any person other than such

agent. Such agent has always received the package in bulk from the company, who have had no further trouble therewith, or any concern with, or part in, the distribution of the several packages contained therein, to the respective owners thereof.

The company have never made any such extra charge to persons not being carriers, innkeepers, warehousemen or wharfingers.

The public, except carriers, innkeepers, warehousemen, and wharfingers, have always been allowed to pack small parcels together into one package, and pay on the entire package, without being subject to the extra charge of 2*d.* per pound above mentioned.

Some of the carriers were detected by the company in packing small parcels, under 2 cwt., into one hamper or package, so as to make it weigh above 2 cwt., with a direction thereon to one consignee, the agent of the carrier, for the purpose of avoiding the said higher rate of charge on packages of and over 2 cwt. The company refused any longer to deal with *263] such carriers as *were detected in doing this, upon the terms of making them the same allowance of 10 per cent., usually made by them to the carriers as above-mentioned; and have, ever since the detection of such practices, compelled them to pay the full rate of carriage, without such deduction of 10 per cent. as aforesaid. The company adopted the like course towards certain carriers whom they detected in altering the addresses of packages brought by such carriers to the railway to be carried by the company, such alteration being made with the view of concealing from the company the fact that such packages belonged to different owners, in order to avoid the higher rate, with which they would otherwise have been charged.

The company, in June, 1841, consented to allow the carriers, by way of compensation for the collection and delivery, as above explained, of parcels under 2 cwt., and also for the risk incurred in such collection and delivery, a deduction from the rates charged by the company to the public for the carriage, loading and unloading, collection and delivery of such parcels, of 5*d.* for each package not weighing 1 cwt., and 10*d.* on each package above 1 cwt., and not exceeding 2 cwt. This allowance has accordingly been made by the company to all carriers on all parcels not exceeding 2 cwt. carried by the company on their railway for such carriers, with the exceptions hereinafter mentioned, from the month of June, 1841, down to this time; and the mode of making it has been, to deduct the amount of such allowance from the amount of charges for carriage of the parcels so allowed for, on paying such charges to the company, and for the carrier to pay them the balance only remaining after such deduction; such allowance of 5*d.* and 10*d.* respectively being a fair and reasonable allowance for the labour, cost and risk thereby saved to the company. The company did not continue this allowance to *those *264] carriers whom they detected in packing together small parcels, or in altering the addresses of packages, in manner, and for the purposes

above mentioned. Where the company once discontinued the said allowance of 10 per cent., and of 5*d.* and 10*d.* respectively to any carrier for the above causes, or either of them, they have never afterwards allowed them again to such carriers, even though they should never have repeated the act for which the company visited them with such a deprivation.

There is no by-law of the company for making or discontinuing the aforesaid allowances. Such allowances or discontinuance were, in all cases, sanctioned, and agreed to, by the directors of the company; and the plaintiff, and all the other carriers dealing with the company, had distinct notice that the company would discontinue such allowance to any carriers detected in packing together small parcels or packages as aforesaid, or in altering the proper addresses and consignment of goods, and making a false declaration of their contents.

With regard to the origin of the said allowances of 10 per cent., 10*d.* and 5*d.*, it appears, that, from the time of the opening of the railway until May, 1841, the carriers had always performed the loading and unloading, weighing and collection and delivery, and the company had always made the carriers an allowance of a certain amount per ton, upon the goods carried by them. In May, 1841, certain carriers applied to the company for a reduction of 20 per cent. from the charges made to the public, and shortly afterwards the directors of the company resolved to allow the carriers the above-mentioned 10 per cent., and it has been always since allowed to them. In the month of June, 1841, certain carriers made an application to the company for further relief: and the directors of the company shortly afterwards resolved to allow, and have ever since allowed, the carriers the deductions of 10*d.* and 5*d.* respectively above-men- [*265
tioned.

In the month of February, 1842, the company made a further alteration in their system of charging the carriers for the carriage of goods for them on the railway. The alteration consisted in this,—that, when one of the public brought several packages of goods, and paid the charges, the company charged him on the weight of the aggregate, although they might belong to different consignees; also, if several of the public brought several packages addressed to one consignee, who was to pay the charges, such consignee was also charged upon the weight of the aggregate. But, if a carrier brought several packages consigned by or to different individuals, he was charged upon the separate weight of each, unless it was known that more than one package belonged to the same sender, and was going to the same consignee; in which case all belonging to the same sender and going to the same consignee were charged upon the aggregate weight. It is to be observed that the above system of charging applied to packages sent by the same train, and not exceeding in weight 1 ton each; and further, that, in all of those of the above cases in which carriers employed the company, and paid their charges as above mentioned, the aggregate of the goods were consigned, and to be delivered by the company, to the carrier

or his agent, and by such carrier or his agent to the ultimate consignees ; and that, in the above cases, the company dealt with, and recognised, the carrier only, as their consignor and consignee of the goods.

The following letter was written and sent on the date thereof by the company's superintendent to Messrs. Baiss & Brothers, wholesale druggists in London, who were in the habit of sending goods by the railway :—

“ Paddington, 26th February, 1842.

*266] “ Gentlemen,—I beg to acknowledge the receipt of *your letter of the 25th instant, requiring certain particulars respecting our mode of charging for goods. In reply, I beg to enclose you one of our books of charges, which are exclusive of a charge of 3d. per cwt. for cartage, except where the weight is under two cwt., when the price therein stated includes that service.

“As to the goods for the different parties being taken in the aggregate and paid for in one lump, our plan is this : the parties who bear one charge are considered to be entitled to the benefit of this ‘lumping system :’—thus, if, on sending to various people, you pay the carriage of them, we would allow them to be taken in the aggregate ; but, if they are to be paid by the receivers, then each individual must pay for his separate weight ; in like manner, if a quantity of packages for one person are congregated from fifty houses in town, and are to be paid by him, this would entitle him, as the party paying the charges, to this privilege.”

In several instances, the company have charged manufacturers and tradesmen at Stroud and Cheltenham, (not carriers,) to whom they have given credit for the carriage of their goods, and with whom the company have had monthly accounts for such carriage, according to the aggregate weight of the same class goods carried by them for such manufacturers, warehousemen, or others (not carriers) during the month ; that is to say, have added together the weight of the same class goods carried on the several days during the month, and have charged the manufacturers, warehousemen or others, (not carriers,) upon, and according to, the gross weight of each class goods so carried during the month ; but this privilege has never been afforded by the company to the carriers, or the plaintiff.

The system of charging in the aggregate, stated in the above letter, has been pursued by the company when employed to carry goods for the public at large, *not carriers, from the date of that letter to the present time, and during all that period the company stated in their printed bills of charge, immediately below the scale of charges—“ The above charges apply to aggregate quantities of goods, which are divided into five classes, according to their value, bulk, &c., a small increase being charged upon less than a ton, as specified below ;” and on this statement the company acted towards the public, but not towards the carriers, during the said period.

In like manner the company charged the carriers, but not the public, so

parately for every package sent by the railway, of whatever kind, class, or weight, intended ultimately for delivery to a different person by the carrier's own consignee, although, as before mentioned, the company had nothing to do with such ultimate delivery, but always delivered the carrier's goods to the carrier's own consignee only, and refused to recognise any other.

In cases where the company carried several packages for the plaintiff, or any other carrier, belonging to several consignees, or belonging to, or intended for final delivery by, the plaintiff or other carrier, or his agent, to different persons, the company were put to no more labour, expense, or trouble, than when the packages belonged to, or were to be delivered by, the plaintiff or other carrier, or his agent, to one and the same person, nor to any more risk, except such as necessarily arises (if any arise) from the mere fact of the packages belonging to several owners, instead of to one owner.

It appears that, during the time in question in this cause, traders, not being carriers, have frequently sent by the railway consignments, comprising several packages of goods, sent by them in the way of their trade to their customers, and on which such traders paid the company's charges. But it does not appear that the *company ever made any extra charge in [*268 such cases on account of any increased risk, (if any such existed,) arising from the circumstance of the several packages belonging to different owners. In all cases, however, in which*the packages were to be delivered to several consignees, such traders not paying the charges as aforesaid, such packages were charged separately, and not on the aggregate weight.

From the 28th of February, 1842, till the commencement of this suit, the company enforced a system of charging the plaintiff and other carriers, for the carriage, by the weight, of every parcel of goods above 2 cwt., and under one ton, separately, even although the several parcels were intended, not merely for the plaintiff's, or other carrier's, consignee, but also for ultimate delivery to the same person, and although they were goods of the same class and carried by the same train, in all cases where the names of the carriers' consignees or consignors of such goods were not given; but, in all cases where the names of such consignors were given, all such parcels, if sent from the same carrier's consignor to the same carrier's consignee, were charged on the aggregate, and not separately. The carriers had notice of this system.

From June, 1840, down to this day, whenever a butcher, cheese-factor, tea-dealer, or any merchant or trader, not a carrier, has sent several parcels of goods of the same class addressed to one consignee, to be carried by the company by the same train on the railway, or addressed to different consignees, yet sent by one consignor, who paid the company's charge for carriage, the company have charged such persons for the carriage of the goods by the aggregate weight of all the parcels, and not by the separate weight of each parcel, the charge by the aggregate being, in all cases, less than that by the separate weights of the parcels.

*269] *In order the better to be able to enforce their said system of charging, the company have, from the year 1841 to this day, required (and the requisition has been complied with by the carriers) that every carrier who has brought goods to any of the company's stations to be carried on the railway, should, before the goods were carried by the company, fill up, and deliver to the company's clerks, two printed forms, one entitled "The carriers' declaration-ticket;" the other "The carriers' ticking-off note."

The former of these—viz. the declaration-ticket—has been required to be filled up at the head thereof with the date of delivery of the goods to the company, the name of the carrier employing the company to carry, the name of the carrier himself, or of his agent as the consignee to whom the company were to deliver the goods at the end of the journey on the rail, the place or station to which the company were to carry the same, and the particular railway train by which the goods were to go, the load, number, classes, and the gross weight of all the goods sent by the carrier by that train to the same station; and the body of the "carriers' declaration-ticket" has been required to be filled up with the number of each parcel, and if any package contained more than one parcel, then with the number of each parcel in such package, the name and address of the ultimate consignee of each parcel, that is to say, not of the person to whom the company were to deliver the parcel, but of the person to whom the carrier or his agent would have to deliver the same, after the company had carried the same and delivered it to the carrier or his agent, the weight of each parcel, with the total weight of all the parcels; and the foot of the declaration-ticket has been required further to be filled up with the total weight of the goods in

*270] each class, in a separate line, with that of the empties in "another line, and the grand total of weights and sums added up at the bottom; and every declaration-ticket has been required to be, and has been, filled up as above stated, and signed by the carrier employing the company or his agent, and delivered to the company's clerks, before the goods were carried by the company.

The carriers' "ticking-off note" has been, and is required to be, filled up at the head thereof with the hour of the train, and the day of the month and year at which the goods are to go, the station to which the goods are to be carried, and the name of the carrier sending his goods, and his or his agent's name to whom they are to be delivered by the company:—the body of the "ticking-off note" was and is divided into columns, of which those headed "name" and "address" were and are to be filled up by the carrier with the names and addresses of the ultimate consignees of each parcel, as before explained; the column headed "description," with a description of each parcel of goods; the several columns headed "class 1st," "class 2d," "class 3d," "class 4th," "class 5th," and "packages under 2 cwt.," with the respective weights of the parcels falling under each of these heads, and the column "*L. s. d.*" was and is left blank for the company's clerks to fill

up; while the line beginning with the words "weights transferred to declaration" was and is filled up by the carrier with the total weights of the goods in each column of the above five classes, and of the packages under 2 cwt. set down at the foot of each column respectively. The course of business between the carriers and the company at their stations was and is for one of the company's servants, at the station of departure, to examine the weights and descriptions of the packages brought there to be carried, and, on finding them correct, or not suspecting them to be incorrect, to tick them off in the column of the said ticking-off note, entitled, "Ticking column outwards," and to write his name at the foot after the printed words "checked by," and fill in the name of the truck. [*271

The "ticking-off note," when thus filled up and checked, was and is delivered to the company's clerks, who made and make out a duplicate of it, inserting in the last column the amounts charged by the company to the carrier for the carriage of the goods, and delivered such duplicate to the carrier, keeping the original filled up by the carrier. The amount of the company's charges, so filled in by the company's clerks, after deducting the allowance of 10 per cent., and the small-parcel allowance in cases where the company made and make those allowances, was and is then paid (unless credit was or is given) by the carrier, in cash, to the company's clerks.

(For the better understanding of the "carriers' declaration-ticket" and "ticking-off note," copies of those documents, filled up, are annexed, and are to be taken as part of the case.)

The plaintiff, during the years 1842 and 1843, carried on a very extensive business as a carrier from and to various towns in connection or communication with the Great Western railway, and, consequently, during those years, employed the company very extensively to carry goods for him, and they have accordingly carried them for him from and to the several stations following, upon the said railway, viz., Paddington, Reading, Stevenage, Farringdon Road, Cirencester, Bath and Bristol.

The goods which the plaintiff has employed the company to carry as mentioned in this case, have never been the plaintiff's own goods, but goods belonging to third persons, who employed the plaintiff to carry them, (as, for instance, from London to Gloucester;) and the plaintiff, after carrying them to the company's station, has then employed the company to carry them part of the journey on their railway,—for instance, from Paddington to Cirencester,—and there delivered them to the plaintiff's agent, [*272 who has then carried them the remainder of the journey in the plaintiff's own vehicles and delivered them to the ultimate consignees. On all occasions where the company have so carried goods for the plaintiff, they have received the goods from the plaintiff or his agent only, and at the end of the journey have delivered them up to the plaintiff or his agent only, and have treated and dealt with him as both the consignor and consignee of the goods: have received payment for the carriage of him only; and, in

case of loss, have made satisfaction to him only, and have refused to recognise, or deliver to, any other person than the plaintiff, or to deal with, or follow any orders from, the persons who have employed the plaintiff to carry the goods. The plaintiff only, and not the company, has contracted or dealt with the persons so employing him to carry the goods. Such persons have always paid him, and not the company, for the carriage; and in case of loss or damage he, and not the company, has made satisfaction for the same. The other carriers for whom the company have carried goods, have dealt with the company, and with their own employers, in the same manner and on similar terms.

The plaintiff, in his dealings with the company, has always performed the collection of the packages and parcels, whether large or small, and the delivery of them to the company at their stations from which the same were to be carried by the company, by his own horses, carts and servants, in the same way, and to the same extent, as those carriers to whom the company have allowed the said deductions of 10 per cent. and of 5*d.* and 10*d.* on the small parcels; and he has also, by his own servants, always performed the weighing, loading and unloading of his packages and parcels, as above explained, with the exception of the aid rendered by the company's servants, as above mentioned, in the same manner and to the same extent, as the carriers to whom the company have allowed the said deductions as aforesaid.

The plaintiff is the most extensive carrier on the line, and the assistance which has been rendered by the company to him is not more than that which they render to any other carrier.

After the goods have been carried by the company to their destined station on the railway, the plaintiff has, by his own or his agent's horses and carts, and servants, always performed the delivery of the packages and parcels so carried for him by the company to the ultimate consignees, in the same way, and to the same extent, as other carriers.

The plaintiff has never requested, or called upon, the company to perform any of those things for which the 10 per cent. and the 10*d.* and 5*d.* have respectively been allowed as aforesaid. In cases in which those allowances have not been made to the plaintiff, the company have never refused to allow their servants to load and unload the plaintiff's goods; and in no instance, where the company have refused to make or continue the said allowance of 10 per cent. and 10*d.* and 5*d.* respectively, as aforesaid, does it appear that they have refused to place him on the same footing with the rest of the public to whom such allowances as aforesaid were not made by the said company.

The plaintiff has usually paid the company, in cash, their charges for the carriage of goods for him at the time when the goods were delivered by him to them to be carried, or before they were delivered to him or his agent, after being carried by the company.

The company, on the 24th February, 1842, discontinued giving the

plaintiff credit, and have not since done so, stating as their reason, by letter to the plaintiff of the same date, "the want of understanding as to the settling *of the charges to Mr. Parker for the carriage of his goods." [*274

The first head of claim made by the plaintiff in this action is, to the above-mentioned allowance of 10 per cent. upon the charges made by the company, and paid by him for the carriage of goods for the plaintiff on the railway, from 28th February, 1842, to the 27th day of April, 1843.

The company made this allowance to the plaintiff on their charges; that is to say, they deducted it from their charges for the carriage of all goods which they carried for him on their railway during the last-mentioned period from Paddington station to Bath station, and *vice versa*; and from Paddington station to Farringdon Road, station, and *vice versa*, except on goods coming up to Paddington from Fairford.

But the company refused to make the said usual allowance of 10 per cent. on their charges, and compelled the plaintiff to pay the full charges, for the carriage of all goods, which they carried for him on their railway during the last-mentioned period between the following pairs of stations, that is, from one to the other, viz., Paddington and Steventon, (except as to these stations, the period between the 28th February, 1842, and the 30th of April following, during which time the company made to the plaintiff the said allowance of 10 per cent. upon the carriage of goods for him upon the said railway between those stations,) Paddington and Cirencester, Paddington and Bristol, Bath and Steventon.

By the term "full charges," now and hereafter used in this case, is meant the charges set down in the said printed bills, and scale-book in force at the time in question, and there stated to include loading and unloading of all packages and the collection and delivery of parcels of 2 cwt. and under, being the same charges (with the exception arising from the charging by the *separate weight of each parcel, instead of the aggregate weight [*275 of several packages of the same class, as mentioned under the third head of claim,) as the company charged the public, not being carriers, during the period aforesaid, for the carriage and loading and unloading of their goods, and for the collection and delivery of parcels of and under 2 cwt. as above mentioned. No difference existed, during the said period from the 28th February, 1842, to the 27th April, 1843, between the nature or extent of the services rendered by the company to the plaintiff at or between the said stations in respect of goods carried between which the said allowance was made, and the services rendered by them to the plaintiff at or between those stations in respect of goods carried between which the said allowance was refused; nor was there any difference in the mode in which the plaintiff's business with the company was conducted at the said stations respectively. But the company, in all cases where the allowance of 10 per cent. was not made to, or not continued with, the plaintiff, were ready and willing to perform all the things which formed the consideration for the said allowance of 10 per cent.

agent. Such agent has always received the package in bulk from the company, who have had no further trouble therewith, or any concern with, or part in, the distribution of the several packages contained therein, to the respective owners thereof.

The company have never made any such extra charge to persons not being carriers, innkeepers, warehousemen or wharfingers.

The public, except carriers, innkeepers, warehousemen, and wharfingers, have always been allowed to pack small parcels together into one package, and pay on the entire package, without being subject to the extra charge of 2*d.* per pound above mentioned.

Some of the carriers were detected by the company in packing small parcels, under 2 cwt., into one hamper or package, so as to make it weigh above 2 cwt., with a direction thereon to one consignee, the agent of the carrier, for the purpose of avoiding the said higher rate of charge on packages of and over 2 cwt. The company refused any longer to deal with *263] such carriers as *were detected in doing this, upon the terms of making them the same allowance of 10 per cent., usually made by them to the carriers as above-mentioned; and have, ever since the detection of such practices, compelled them to pay the full rate of carriage, without such deduction of 10 per cent. as aforesaid. The company adopted the like course towards certain carriers whom they detected in altering the addresses of packages brought by such carriers to the railway to be carried by the company, such alteration being made with the view of concealing from the company the fact that such packages belonged to different owners, in order to avoid the higher rate, with which they would otherwise have been charged.

The company, in June, 1841, consented to allow the carriers, by way of compensation for the collection and delivery, as above explained, of parcels under 2 cwt., and also for the risk incurred in such collection and delivery, a deduction from the rates charged by the company to the public for the carriage, loading and unloading, collection and delivery of such parcels, of 5*d.* for each package not weighing 1 cwt., and 10*d.* on each package above 1 cwt., and not exceeding 2 cwt. This allowance has accordingly been made by the company to all carriers on all parcels not exceeding 2 cwt. carried by the company on their railway for such carriers, with the exceptions hereinafter mentioned, from the month of June, 1841, down to this time; and the mode of making it has been, to deduct the amount of such allowance from the amount of charges for carriage of the parcels so allowed for, on paying such charges to the company, and for the carrier to pay them the balance only remaining after such deduction; such allowance of 5*d.* and 10*d.* respectively being a fair and reasonable allowance for the labour, cost and risk thereby saved to the company. The company did not continue this allowance to *264] *those carriers whom they detected in packing together small parcels, or in altering the addresses of packages, in manner, and for the purposes

above mentioned. Where the company once discontinued the said allowance of 10 per cent., and of 5*d.* and 10*d.* respectively to any carrier for the above causes, or either of them, they have never afterwards allowed them again to such carriers, even though they should never have repeated the act for which the company visited them with such a deprivation.

There is no by-law of the company for making or discontinuing the aforesaid allowances. Such allowances or discontinuance were, in all cases, sanctioned, and agreed to, by the directors of the company; and the plaintiff, and all the other carriers dealing with the company, had distinct notice that the company would discontinue such allowance to any carriers detected in packing together small parcels or packages as aforesaid, or in altering the proper addresses and consignment of goods, and making a false declaration of their contents.

With regard to the origin of the said allowances of 10 per cent., 10*d.* and 5*d.*, it appears, that, from the time of the opening of the railway until May, 1841, the carriers had always performed the loading and unloading, weighing and collection and delivery, and the company had always made the carriers an allowance of a certain amount per ton, upon the goods carried by them. In May, 1841, certain carriers applied to the company for a reduction of 20 per cent. from the charges made to the public, and shortly afterwards the directors of the company resolved to allow the carriers the above-mentioned 10 per cent., and it has been always since allowed to them. In the month of June, 1841, certain carriers made an application to the company for further relief: and the directors of the company shortly afterwards resolved to allow, and have ever since allowed, the
 *carriers the deductions of 10*d.* and 5*d.* respectively above-men-
 tioned. [*265]

In the month of February, 1842, the company made a further alteration in their system of charging the carriers for the carriage of goods for them on the railway. The alteration consisted in this,—that, when one of the public brought several packages of goods, and paid the charges, the company charged him on the weight of the aggregate, although they might belong to different consignees; also, if several of the public brought several packages addressed to one consignee, who was to pay the charges, such consignee was also charged upon the weight of the aggregate. But, if a carrier brought several packages consigned by or to different individuals, he was charged upon the separate weight of each, unless it was known that more than one package belonged to the same sender, and was going to the same consignee; in which case all belonging to the same sender and going to the same consignee were charged upon the aggregate weight. It is to be observed that the above system of charging applied to packages sent by the same train, and not exceeding in weight 1 ton each; and further, that, in all of those of the above cases in which carriers employed the company, and paid their charges as above mentioned, the aggregate of the goods were consigned, and to be delivered by the company, to the carrier

lowed, and the said stations in respect whereof it was refused, as to the extent of the services actually performed by the company for the plaintiff at or between such stations, or the extent of the actual services rendered by the plaintiff in *relation to the small parcels. But whenever the
 *279] company refused to make the said allowances to the plaintiff, they were ready and willing to place the plaintiff on the footing of one of the public with regard to the collection and delivery of such small parcels; of which readiness and willingness the plaintiff was aware, having had the ordinary public notice.

On every occasion during the last-mentioned period, when the plaintiff delivered small parcels to the company at any of the said last-mentioned stations, to be carried by them for him on the railway between either of those pairs of stations—that is, from one to the other of each pair,—the plaintiff or his clerk, after the usual “carriers’ declaration-ticket” and “ticking-off note” had been filled up, signed and delivered to the company’s clerks, according to the course of business above explained; and, after the company’s clerks had delivered to the plaintiff or his clerk the duplicate of the ticking-off note filled up with the company’s charges for the carriage of such small parcels, as above explained, such charges being always the full charges, as above explained, and before the plaintiff had paid the charges for such carriage, the plaintiff required the company to deduct the said allowance of 5*d.* on parcels of and under 1 cwt., and of 10*d.* on parcels of and under 2 cwt., from their said full charges, for the carriage of such small parcels as aforesaid, and offered to pay the amount of such charges, less such deduction as aforesaid, and required the company to carry the said small parcels for the plaintiff on their railway from and to the said stations respectively, for the amount of such charges, less such deduction as aforesaid. But on every such occasion, the company refused to carry such small parcels for the plaintiff, unless he would pay to them for the carriage of the said goods, the amount of their said full charges, and
 *280] without making any such deduction or *allowance as aforesaid, and so informed the plaintiff; and thereupon, on every such occasion, the plaintiff, in order to get the company to carry the said small parcels as aforesaid, was obliged to pay, and did pay, in cash to the company for the carriage of such small parcels as aforesaid, under protest against their right to demand it, the amount of their said full charges for carriage, without any such deduction as aforesaid; and thereupon the company always carried the said small parcels as desired by the plaintiff. The total amount of the said allowance of 5*d.* on every parcel of and under 1 cwt., and 10*d.* on every parcel of and under 2 cwt. so carried by the company for the plaintiff as aforesaid between the last-mentioned stations, that is, from one to the other of the same pair, during the period last mentioned,—and the full charges for the carriage whereof were so paid by the plaintiff under protest as aforesaid—would have been 238*l.* 17*s.* 7*d.*; and this sum of 238*l.* 17*s.* 7*d.* is the second head of the plaintiff’s claim in this action.

The statements hereinbefore contained with regard to the reasons for the disallowance of the 10 per cent. apply to the disallowance of the said sums of 5*d.* and 10*d.*; and whereas no reason was assigned for the one, so none was assigned for the other.

The third head of claim made by the plaintiff is, to the amount of overcharges, if any, made by the company to him on packages of goods exceeding 2 cwt. and under 1 ton, and carried by them, as common carriers, for him on their railway, between the said 28th of February, 1842, and the 27th of April, 1843, by charging for each package separately, instead of charging the several packages by the aggregate weight of the whole, in cases where several packages of goods of the same class were carried by the same train at the same time from the same station to the same station, and where the company were employed by the plaintiff to carry the said *packages, and deliver them to him or his agent at the end of the journey [*281 on the railway, both in cases where such packages were sent to the plaintiff by one consignor or several consignors, and in cases where they were to be delivered by him or his agent to one and the same ultimate consignee, and also where the said packages were intended for delivery by the plaintiff or his agent to different ultimate consignees.

Upon some occasions subsequent to the 1st of April, 1843, the plaintiff's agents refused to inform the company's agents whether packages were from one consignor or from several consignors.

The company enforced their above-mentioned system of charging every one of several packages exceeding 2 cwt. and under 1 ton by its separate weight, instead of charging all packages over that weight of the same class, and going by one train from and to the same place by their aggregate weight, on all occasions during the period last aforesaid when they carried packages above 2 cwt. and under 1 ton on their railway for the plaintiff, without exception of any stations.

On every occasion during the last-mentioned period where the plaintiff delivered to the company, at any one of their said stations, several packages of goods of the same class exceeding 2 cwt. each, and under 1 ton, to be carried by them for him on their said railway by the same train from such one of their stations, to another of their stations, and to be delivered all at the same station to the plaintiff or his agent after the usual carriers' declaration-ticket and ticking-off note had been filled up, signed and delivered to the company's clerks, according to the course of business above explained; and, after the company's clerks had delivered to the plaintiff or his clerk the duplicate of the ticking-off note, filled up with the company's full charges for the carriage of such packages above 2 cwt. and under 1 ton, as above *explained, such charges being always made out on the weight of each package separately according to the rates fixed by the company's published scale book and list of rates then in force and then charged to the public, and not on the aggregate weight of the several packages of the same class; and before the plaintiff had paid the charges for such

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carriage of such packages, the plaintiff required the company to charge for the carriage of such packages as aforesaid on the aggregate weight of the several packages above 2 cwt. and under 1 ton each of the same class, to be carried for the plaintiff by the same train from the same station to the same station, and there delivered to the plaintiff according to the rates fixed by their said scale-book and list of rates then in force, and not on the weight of each such packages separately; and he offered to pay the company the amount of their charges for the carriage, as last aforesaid, of such packages as last aforesaid, calculated on the aggregate weight of such packages, according to the rates aforesaid, and required the said company to carry the said packages for the plaintiff by the same train from the same station to the same station, and there deliver the same to the plaintiff for the amount of their charges, for such carriage calculated on the aggregate weight of such packages of the same class as above mentioned. But, on every such occasion, the company always refused to carry such packages for the plaintiff unless he would pay them the amount of their said full charges for such carriage of such packages, calculated according to the published rates aforesaid on the separate weight of each of the said packages as above mentioned, which always exceeded the amount of such charges calculated on the aggregate weight of such packages; and so informed the plaintiff; and thereupon, on every such occasion, the plaintiff, in order to get the company to carry the said packages, was obliged to pay, *283] and did pay, in *cash to the company, under protest against their right to demand the same, the amount of their said full charges for the carriage of such packages as aforesaid, as calculated by them on the separate weight of each package above mentioned; and the company thereupon carried such packages as required by the plaintiff.

The total amount of the charges thereby made by the company against the plaintiff and paid by him under protest as aforesaid, during the last-mentioned period, for the carriage of such packages as last aforesaid, going by the same train from the same station to the same station, over and above what would have been the amount of the said charges calculated on the aggregate weight of all packages of the same class carried for the plaintiff by the same train from and to the same station, according to the published rates then in force as aforesaid, is 20*l.* 3*s.* 9*d.*; and this sum is the third item claimed by the plaintiff, in this action.

That portion of the sum of 20*l.* 3*s.* 9*d.* which consists of charges paid by the plaintiff to the company as above mentioned, for the carriage of such of the same packages of the same class above 2 cwt. and under 1 ton as were sent by one original consignor to one ultimate consignee, and were carried by the same train from the same station to the same station, over and above what the company would have charged the plaintiff for the carriage had he disclosed to them the names of the said consignors, amounts to 17*l.* 5*s.* 5*d.*

There is no direct evidence of the amount in value of the additional risk

(if any such additional risk there be) occasioned to the company by the circumstance that the goods sent by the plaintiff and other carriers belonged to several owners instead of a single owner.

Many actions have been brought against the company by their own customers; but it does not appear that *any have been brought against the company by the customers of the carriers. [*284

The court is to be at liberty to draw any inference from the facts stated herein, which, in their judgment, a jury ought to make. It is agreed that the action was brought in due time, and that due notice of action was given, if any was necessary, and that the venue is laid in the proper county.

The case was argued in last term.(a)

Talfourd, Serjt., (with whom were *R. V. Richards*, *Channell*, Serjt., and *Alexander*,) for the plaintiff, contended that, under the terms of the acts of parliament by which the company was incorporated,(b) they were bound to make equal charges upon all parties; and, therefore, that they were not justified in compelling the plaintiff to pay the moneys mentioned in the case; *Pickford v. The Grand Junction Railway Company*, 10 M. & W. 399;(c) and that the action for money had and received lay under the circumstances, as the money sought to be recovered, though paid with a full knowledge of the facts, had been extorted from the plaintiff by the company as the price of the performance of a duty cast by law upon them; *Dew v. Parsons*, 2 B. & A. 562; *Morgan v. Palmer*, 2 B. & C. 729, 4 D. & R. 283; *Ansell v. Wuterhouse*, 6 M. & S. 385; *Waterhouse v. Keen*, 4 B. & C. 200, 6 D. & R. 257; *Parsons v. Blandy*, Wight. 22; *Smith v. Bromley*, 2 Dougl. 697, n.; *Palmer v. The Grand Junction Railway Company*, 4 M. & W. 749; *Pozzi v. Shipton*, 8 A. & E. 963, 1 P. & D. 4; *Astley v. Reynolds*, 2 Stra. 915. [*285

Bompas, Serjt., (with whom were *Whateley* and *Keating*,) for the defendants, contended that no action at all was maintainable under the circumstances; and that, at any rate, the action was misconceived in point of form, as each payment had been made voluntarily and under a contract. He cited Doct. & Stud. ch. 38; *Hyde v. The Trent and Mersey Navigation Company*, 5 T. R. 389; *Brisbane v. Dacres*, 5 Taunt. 143; *Bilbie v. Lumley*, 2 East, 469; *Knibbs v. Hall*, 1 Esp. N. P. C. 84, and *Brown v. McKinnally*, 1 Esp. N. P. C. 279. *Cur. adv. vult.*

TINDAL, C. J., now delivered the judgment of the court.

This case was argued before us during the last term, when two questions were raised for the opinion of the court,—viz., first, whether the defendants were justified in compelling the plaintiff to pay the several sums of money mentioned in the case, under the circumstances therein stated; and, secondly,

(a) January 24th and 26th. Before Tindal, C. J., Erskine, Maule, and Cresswell, Js.

(b) The 5 & 6 W. 4, c. cvii. ss. 163, 164, 165, 166, 167, 168, 170, 171, 172, 175, 177, 181, 182, 189, 190, 191, and 193, 1 Vict. c. xcii. ss. 41, 42, 43, & 44., and 2 Vict. c. 27, s. 24, were referred to in the course of the argument.

(c) S. C., not S. P., 8 M. & W. 372, where the pleadings are set out.

if they were not, whether the plaintiff can recover them in this action for money had and received to his use.

In order to answer the first question, it is necessary to examine the several acts of parliament which the defendants have obtained for the purpose of enabling them to construct the Great Western railway as it now exists, and to use it as carriers of goods and passengers for reward. The first of those acts is the 5 & 6 W. 4., c. cvii. That statute begins by empowering *286] certain *parties to make a railway, and the first and eighth sections relate to the construction of the railway and the acquisition and enjoyment of property therein. Then the 163d section enacts, "that all persons shall have free liberty to pass along and upon, and to use and employ, the said railway, with carriages properly constructed as by this act directed, upon payment only of such rates and tolls as shall be demanded by the said company, not exceeding the respective rates or tolls by this act authorized, and subject to the provisions of this act, and to the rules and regulations which shall from time to time be made by the said company or by the said directors, by virtue of the powers to them respectively by this act granted."

The next two sections fix a maximum for the rates and tolls to be taken by the company for passengers, goods or cattle, conveyed upon the railway.

The 166th section enables the company to provide locomotive, or other power, for drawing, or propelling, passengers or goods, along the railway, and to charge for such engines or power in addition to the rates and tolls before given. So far the provisions do not appear to contemplate that the company themselves would act as carriers of either passengers or goods. But the next section, the 167th, enacts, "that it shall be lawful for the said company, and they are hereby authorized, if they shall think proper, to use and employ locomotive engines or other moving power, and, in carriages or wagons drawn or propelled thereby, to convey upon the said railway, and also along and upon any other railway communicating therewith, all such passengers, cattle, and other animals, goods, wares and merchandise, articles, matters and things, as shall be offered to them for that purpose, and to make such reasonable charges for such conveyance as they may from time to time determine upon, in addition to the several rates or tolls by this act

*287] *authorized to be taken." The 174th section authorizes the company to reduce all or any of the rates or tolls authorized to be taken, and again to raise the same or any of them, so that they shall not at any time exceed the amount by that act authorized to be taken, with this proviso in the 175th section, "that the aforesaid rates and tolls, to be taken by virtue of this act, shall at all times be charged equally, and after the same rate per ton, per mile, throughout the whole of the said railway in respect of the same description of articles, matters or things, and that no reduction or advance in the said rates and tolls shall, either directly or indirectly, be made partially, or in favour of, or against, any particular person or company,

or be confined to any particular part of the said railway, but that every such reduction or advance of rates and tolls upon any particular kind or description of articles, matters or things, shall extend to and take place throughout the whole and every part of the said railway, upon, and in respect of, the same description of articles, matters and things, so reduced or advanced, and shall extend to all persons whatsoever using the same, or carrying the same description of articles, matters and things, thereon; any thing to the contrary thereof, in any wise notwithstanding." Had this been the only enactment relating to equality of rates, it might have been contended that it does not apply to the carriage of goods or passengers by the company themselves acting as carriers, but only to the rates or tolls to be charged for goods or passengers conveyed by others. But by the 1 Vict. c. xcii. the company were authorized to extend the line originally provided for to Paddington, and to convey goods and passengers along such extended line. Then followed the 2 Vict. c. xxvii., which applied to the whole line so extended; and the twenty-fourth section enacts, "that the charges, by the said recited acts or either of them, authorized to be made *for the carriage of any passengers, goods, animals, or other matters or things to be conveyed by the said company, or for the use of any steam power or carriage to be supplied by the said company, shall be, at all times, charged equally to all persons, and after the same rate per mile, or per ton per mile, in respect of all passengers, and of all goods, animals or carriages of a like description, and conveyed or propelled by a like carriage or engine passing on the same portion of the line; and no reduction or advance in any charge for conveyance by the company, or for the use of any locomotive power to be supplied by them, shall be made, either directly or indirectly, in favour of, or against, any particular company or person travelling upon, or using, the same portion of the said railway. [*288

From these several enactments it appears clearly to have been the intention of the legislature, that the parties incorporated should be empowered to construct the railway, and hold it as their property, and derive certain profits from it, but that every member of the community should have an equal right to use it on the terms prescribed by the act; and that the payment to be made for such uses, whether under the denomination of rates or tolls, or charges fixed by the company, should be reasonable and equal to all persons, without reference to the particular advantage to be derived by any individual, or class of individuals, from such uses. And it is to be observed, that the language of these acts of parliament is to be treated as the language of the promoters of them. They ask the legislature to confer great privileges upon them, and profess to give the public certain advantages in return. Acts passed under such circumstances should be construed strictly against the parties obtaining them, but liberally in favour of the public.

Now, have the charges been reasonable and equal in the instances stated in this case, or was there an advance *in the charges for

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the carriage of goods by the company, directly or indirectly, against the plaintiff? And, first, with regard to the allowance of 10 per cent. As to that, it appears that the company have always, for the carriage of goods, charged the public at the rates specified in certain printed bills, and a scale-book, annexed to this case; and that for such charge they have performed the loading and unloading and reloading of the goods as explained in the case, and also the weighing, whenever they thought that necessary; but that, by a general arrangement with carriers, the latter have performed all those duties, and in addition, have made out what are called ticking-off notes, and carriers' declaration-tickets, and have been allowed by the company a deduction of 10 per cent. from the charges made to the public at large. And the case proceeds to state that the loading, unloading and weighing, and the preparation of ticking-off notes and carriers' declaration-tickets, was a reasonable equivalent for the allowance of 10 per cent.; or, in other words, that the carriers, discharging those duties at their own expense, and receiving an allowance of 10 per cent., are thereby placed on an equal footing with the public, who are at no such expense and trouble. Can it then be said, that the same charge is reasonable both for the public at large and the carrier; when the latter discharges at his own expense and for the benefit of the company, certain duties, for which an allowance of 10 per cent. is no more than a fair equivalent; and, if that allowance is refused to one carrier, although willing to discharge, and in fact discharging, all that other carriers do in respect of it, can it be said that the company do not, directly or indirectly, advance against such carrier their charges for the conveyance of them by them? It appears to us that the full charge to the plaintiff, a carrier, under such circumstances, is not reasonable, and that

*290] the charge of the company for the *conveyance of goods by them has been raised against him, and that they could not legally make the larger charge upon him, notwithstanding the statement in the case, that, where the allowance of 10 per cent. was not made to, or continued with, the plaintiff, the company were ready and willing to perform all the things which formed the consideration for that allowance.

As to the second head of claim,—viz., the allowance of 5*d.* and 10*d.* for the collection and delivery of parcels of and under the weight of 1 cwt., and of and under the weight of 2 cwt. respectively, the case of *Pickford v. The Grand Junction Railway Company*, 10 M. & W. 399, is a direct authority that the company had not a right to charge the plaintiff the same sum for the carriage of goods for him, as they charge to the public; for, in the latter case, the charge includes the cost of collection and delivery, which the plaintiff did for himself. There, the company charged 65*s.* per ton for carriage, including delivery; and it was held that they had no right to impose the same charge for carriage without delivery, and the sum of 10*s.* per ton having been allowed by the company to the carriers who delivered goods for them; it was held, that 55*s.* per ton was the proper price to be charged for the carriage of goods to a carrier who delivered them himself.

In like manner, the present defendants, having allowed to other carriers 5*d.* and 10*d.* for the collection and delivery of the two descriptions of small parcels before mentioned, have shown that the charge specified in their bills and scale-book, which includes collection and delivery, ought to be diminished by those sums to persons who collect and deliver for themselves. It was argued, that the company were ready and willing to place the plaintiff on the footing of one of the public *with regard to the collection and delivery of small parcels; but they had no right to [*291 compel him to accept that service at their hands, or pay them for it; as was decided in the case referred to.

The third head of claim arises out of an alleged difference in the charges made by the company to the public at large and to carriers, for the conveyance of goods, such difference not being directed against any individual carrier, but against all carriers, as contra-distinguished from individuals of the public at large. As to this difference, the case states, that, when one of the public has brought several packages of goods and paid the charges, the company have charged him on the weight of the aggregate, although they may have belonged to different consignees: also, if several of the public have brought several packages addressed to one consignee, who was to pay the charges, such consignee has been charged upon the weight of the aggregate; but, if a carrier has brought several packages consigned by or to different individuals, he has been charged upon the separate weight of each, unless it was known that more than one package belonged to the same sender, and was going to the same consignee, in which case all belonging to the same sender and going to the same consignee were charged upon their aggregate weight. And in all such cases where carriers were concerned, the company dealt with, and recognised, the carriers only as their consignor and consignee of the goods. In addition to this, from the 28th of February, 1842, till the commencement of this suit, the company enforced a system of charging the plaintiff and other carriers for the carriage by the weight of every parcel of goods above 2 cwt., and under 1 ton separately,—even though the several parcels were intended, not merely for the plaintiff's or other carrier's consignee, but also for ultimate delivery to the same person, and though *they were goods of the same class, carried by the same train,—in all cases where the names of the carrier's consignor or consignors of such goods were not given; but in all cases where the names of such consignors were given, all such parcels, if sent from the same carrier's consignor to the same carrier's consignee, were charged on the aggregate, and not separately. The case further states, that, on all occasions when the company have carried goods for the plaintiff, they have dealt with him only, and have refused to recognise any other person, either as consignor or consignee. It appears to us, then, that the company are bound to treat the plaintiff as consignor and consignee for all purposes, including the mode of charging in the aggregate; and that they have no right to make a distinction in that respect between him and any [*292

other individual member of the public. Of the sum constituting this third head of claim it appears that a small portion, 17l. 5s. 5d., would not have been charged had he disclosed the names of the consignors and consignees of the goods; but we find nothing in the statute requiring him to make such disclosure; and the company had no right to withhold from him, in consequence of his refusal to make it, any allowance to which he would have been otherwise entitled. Upon the whole, then, it appears to us that the company had no right to enforce from the plaintiff payment of any of the sums of money which constitute the three heads of claim set forth in the case.

But it remains to be considered whether the money so paid can be recovered by the plaintiff in this action.

It was argued for the defendants that it cannot; for, that the payments were made voluntarily, with a full knowledge of all the circumstances; and that the plaintiff was not compelled to make those payments, but, in each case, must be considered as having made a contract with the company to *293] pay them a certain sum of money *as the consideration for the carriage of his goods; and that, having made such contracts, he cannot now retract, and recover the money paid in pursuance of them. In support of this argument *Knibbs v. Hall*, 1 Esp. N. P. C. 84; *Brown v. McKinally*, 1 Esp. N. P. C. 279; *Bilbie v. Lumley*, 2 East, 469, and *Brisbane v. Dacres*, 5 Taunt. 143, were cited. On the other side, it was urged, that these could not be considered as voluntary payments; that the parties were not on an equal footing; that the defendants would not, until such payments were made, perform that service for the plaintiff which he was entitled by law to receive from them without making such payments; and that, consequently, he was acting under coercion; and in support of this view of the case, *Dew v. Parsons*, 2 B. & Ald. 562, 1 Chitt. Rep. 295; *Morgan v. Palmer*, 2 B. & C. 729, 4 D. & R. 283, and *Waterhouse v. Keen*, 4 B. & C. 200, 6 D. & R. 257, were referred to.

We are of opinion that the payments were not voluntary. They were made in order to induce the company to do that which they were bound to do without them; and for the refusal to do which, an action on the case might have been maintained, as was expressly decided in the case of *Pickford v. The Grand Junction Railway Company*. And, in this respect, the case very much resembles that of ——— v. *Pigott*, mentioned by Lord KENYON, in *Cartwright v. Rowley*, 2 Esp. N. P. C. 723. That was an action brought to recover back money paid to the steward of a manor, for producing at a trial some deeds and court rolls, for which he had charged extravagantly. The objection was taken that the money had been voluntarily paid, and so could not be recovered back again; but, it appearing *294] that the party could not do without *the deeds, so that the money was paid through necessity, and the urgency of the case, it was held to be recoverable. We think the principle upon which that decision proceeded is a sound one, and strictly applicable in the present case, and that

the defendants cannot, by the assistance of that rule of law on which they relied, retain the money that they have improperly received.

Upon the whole case, therefore, we think that the verdict should stand for the plaintiff, as it is at present entered.

Judgment for the plaintiff.(a)

(a) As to the first point, vide *The Queen v. The Company of Proprietors of the Leicestershire and Northamptonshire Union Canal Company*, 3 Carrow & Oliver's Railway and Canal Cases, 1.

*MARGARET BROCKBANK (Administratrix, &c., of JOHN BROCKBANK, deceased) v. WILLIAM ANDERSON and ROBERT WISE. Feb. 12. [*295]

By an agreement between A., the owner of a ship, and B. and C., the ship was to be placed under the management of B. & C., to load outwards from Liverpool with a cargo for The Cape, Singapore, &c., consigned to their houses at these several ports. Before proceeding on the voyage, the captain received from B. & C. a letter of instructions, desiring him to proceed on his return from Singapore to The Cape, in which letter was the following passage:—"On your arrival there, you will call upon our managing partner D., and follow such directions there as he may give you regarding such part of the cargo as is consigned to his firm, and which he requires to be landed there." At Singapore, B. & C. shipped coffee for London, to be delivered to the shippers' order, pursuant to bills of lading signed by the captain, and endorsed without his knowledge, to certain persons in London. When the ship arrived at the Cape, the coffee being found to be in a heated state, was, by the orders of D., unshipped and sold. A. was afterwards compelled to pay the consignees of the coffee for the non-delivery thereof. D. being examined upon interrogatories, expressly stated that he was not a partner with B. & C.

In case brought by A. against B. and C., for wrongfully unshipping and selling certain coffee at the Cape of Good Hope, the declaration alleged, that, "the defendants, by their agents, at the said several ports, had and exercised the management and direction, ordering, control and government of the said ship, touching and in relation to the loading and unloading and freighting the same, and the consignment and disposition of the outward and homeward cargo thereof."

Held, that the description given of D. by B. & C. in their letter of instructions, was not conclusive on them as to the point of his being a partner; and that, with respect to an objection taken to the admissibility of his evidence, the statement made by him in his examination upon interrogatories had the same effect as if it had been made in an examination upon the *voir dire*.

Held, also, that the allegation in the declaration as to the management, &c., of the ship was not proved, and therefore that the plaintiff was not entitled to recover upon the special count.

Held, also, that having, as ship-owner, the possession of, and a special property in, the coffee which had been wrongfully sold at The Cape, he was entitled to recover on a count in trover.

The court will not take upon themselves the office of a jury, to draw inferences from facts, where such facts are to be decided upon the conflicting testimony of witnesses, whose credit is questioned.

CASE. The first count of the declaration stated, that, in the lifetime of John Brockbank, since deceased, he, the said John Brockbank, was the owner *of a certain ship or vessel called The Lady Gordon, and [*296] the defendants were merchants and ship-brokers, carrying on trade and business as such merchants and ship-brokers at London and Liverpool, in England, under the name, style and firm of Anderson, Wise and Co.; and also carrying on business by themselves and their agents at the Cape of Good Hope, under the name, style and firm of William Anderson, senior,

and Co.; and also carrying on business at Batavia and Singapore, under the name, style and firm of Robert Wise and Co.; and that, in the lifetime of J. Brockbank, and before the committing, &c., and whilst the said J. B. was such owner, and the defendants were so carrying on their trade and business in manner aforesaid, to wit, on the 5th of March, 1831, an agreement was made and entered into by and between J. Brockbank, owner of the ship *Lady Gordon*, of Whitehaven, and the defendants, Messrs. Anderson, Wise and Co., of Liverpool, merchants: by an agreement the said ship *Lady Gordon* was to be placed under the management of the defendants, to load outwards from Liverpool with a general cargo for the Cape of Good Hope, Batavia, Singapore, and, if agreeable to the captain and Robert Wise and Co., in India, to Manilla; the defendants to ship, in the said ship, all the goods which they may have on consignment to the Cape of Good Hope, Batavia, Singapore, and Manilla, and also use their best exertions in conjunction with Messrs. Ashley, Brothers, as ship-agents, to procure goods on freight for the above places, both from their own particular connections and from merchants generally; the said J. Brockbank to allow the defendants and brokers to do the ship's business at the custom-house in Liverpool, and to pay the customary commission of 5 per cent. on all freight procured for the said ship to the said merchants and brokers: the said owner also *297] engaged to receive on board the said ship, goods at the same rate of freight as was currently given to the Cape of Good Hope, Batavia, Singapore, and Manilla; and, on the arrival of the ship at the Cape of Good Hope, the house of William Anderson, senior, and Co., there, to have the consignment of the said ship during her stay there, which was not to exceed twelve days; and, on the arrival of the ship at the said ports of Batavia, Singapore and Manilla, the houses there, of Messrs. Robert Wise and Co., were to use their best endeavours to procure good employment, or freight, for the said ship to return to Europe, for all of which they were to receive the customary commission: and that it was further agreed, that the said ship should call at the ports of Batavia and the Cape of Good Hope on her passage to Europe, if required by the said merchants; and that the ship should be consigned to R. Wise and Co. and W. Anderson, senior, and Co., respectively on the said homeward voyage; and, should the ship return to London or Liverpool, A. W. Anderson, senior, and Co., at those respective ports, were to transact the business inwards. The ship not to be detained longer in Batavia, in discharging, than fifteen days. The declaration then proceeded to state that one Nathaniel Harmer was appointed captain and master of the ship for the said voyage; and set out certain instructions, dated the 2d of May, 1831, from the defendants to Harmer, so being captain of the said vessel as aforesaid, by which he was directed to apply to the defendants' partners at Singapore, and to call at the Cape of Good Hope on the voyage homewards, and to land there what part of his homeward cargo the house there should require. The declaration then stated that the said ship was, according to the said agreement, placed

under the management of the defendants to load outwards with a general cargo, and, on the 1st of November, 1831, arrived at Singapore, where the defendants, by Robert Wise and Co., their agents there, *shipped, [*298 as part of her homeward cargo, 657 bags of coffee, as and for freight, to be conveyed on board the said ship from Singapore to London, and there to be delivered to the order of the said shippers, pursuant to bills of lading thereof signed by the captain: that the ship sailed from Singapore: that Harmer so being such captain, did, in all respects, duly comply with the said letter of instructions, and did duly proceed with the ship to the several ports in the said instructions mentioned; and that the defendants, by their agents aforesaid, at the said several ports, had the consignment of the said ship or vessel, according to the said agreement, *and at those several ports respectively, had and exercised, and claimed to have and exercise, the management and direction, ordering, control and government of the said ship or vessel, touching, and in relation to, the loading and unloading, and freighting of the same, and the consignment and disposition of the outward and homeward cargo thereof*; that the ship, in the course of the homeward voyage to London, on the 23d of January, 1832, according to the said agreement and the said instructions of the defendants' said agents, proceeded to, and touched at, and entered the port at the Cape of Good Hope, and, on the 1st of June, 1832, arrived at the port of London: that, after the said bills of lading had been signed by the captain, and before the arrival of the ship at the Cape of Good Hope, the defendants endorsed the bills of lading, and made the coffee deliverable, to certain persons in London,—viz., J. Dugdale and Brothers, Messrs. Thompson and one Douglas, who then became and were the consignees thereof, and entitled to demand and receive the same pursuant to the said bills of lading. The declaration then stated that the defendants, whilst they had and exercised, and claimed to have and exercise, such management, &c. of the ship, touching and relating to the loading and unloading and freighting of the same, and *the [*299 consignment and disposition of the said homeward cargo, misconducted themselves in and about a certain part of the cargo, in this, that they, by their agents at the Cape of Good Hope, wrongfully and improperly caused and procured the said 657 bags of coffee,—and which had been so as aforesaid shipped in and on board of the said ship at Singapore, to be carried and conveyed therein to the port of London, and which had been so consigned as aforesaid,—to be, at the Cape of Good Hope, unshipped and unloaded, kept, detained, and disposed of, and despatched the said ship from the Cape of Good Hope, homeward-bound to London, without any part of the said coffee so consigned as aforesaid, being on board thereof to be delivered to the consignees; by reason whereof a certain action at law was brought by J. Dugdale, Brothers, as consignees, against J. Brockbank for the non-delivery of the said coffee, in which action J. Dugdale, Brothers, recovered against J. Brockbank 945*l.* 10*s.* for their damages, costs, and charges; that another action was brought by Messrs. Thompson against

Brockbank for the non-delivery to them of the said part of the said coffee which had been consigned to them as aforesaid, of which J. Brockbank was forced to pay the sum of 1000*l.*, to compromise the last-mentioned action, was liable to be sued by Mr. Douglas, to whom the residue of the coffee was consigned, for the non-delivery thereof.

The declaration also contained a count in trover, for the conversion of 657 bags of coffee, the property of the intestate, in his lifetime.

The defendants pleaded severally—first, not guilty; secondly, the leave and license of J. Brockbank in his lifetime; verification.

Thirdly, to the first count a denial that the defendants, by their agents, *300] had or exercised, or claimed to *have or exercise, at the ports in the declaration mentioned, the management, direction, ordering, control or government of the said ship, touching, or in relation to, the loading and unloading, and freighting of the same, as alleged therein, and the consignment and disposition of the outward or homeward cargo thereof, or any part thereof, *modo et formâ*; concluding to the country.

Fourthly, to the first count, a denial that J. Dugdale, Brothers, recovered against J. Brockbank, and that J. Brockbank had been compelled to pay, and that J. Brockbank in his lifetime, or the plaintiff, as administratrix as aforesaid, were liable to be sued, as in the first count mentioned, *modo et formâ*; concluding to the country.

Fifthly, to the last count, a denial that the goods were the property of J. Brockbank, *modo et formâ*; concluding to the country.

The plaintiff joined issue on the first, third, fourth, and fifth pleas of each defendant, and replied *de injuriâ* to the second plea, on which issue was joined.

The cause came on to be tried at the Middlesex sittings after Michaelmas term, 1841, before TINDAL, C. J., when a verdict was taken for the plaintiff, with 3000*l.* damages, subject to the following case:—

The plaintiff is the administratrix of John Brockbank, who was owner of a ship called *The Lady Gordon*; and the defendants are general merchants and commission-agents, and ship brokers, carrying on business at London and Liverpool, under the firm of Anderson, Wise and Co., and at the Cape of Good Hope, under the firm of William Anderson, senior, and Co., and at Batavia and Singapore, under the firm of Robert Wise and Co. Mr. Anderson, during and since the year 1831, has resided and does reside in London, and Mr. Wise in Liverpool.

*301] On the 5th of March, 1831, the following agreement *was entered into between J. Brockbank as owner of the ship *Lady Gordon*, and the defendants.

“*Liverpool, 5th March, 1831.*

“It is this day agreed between Mr. John Brockbank, owner of the ship *Lady Gordon*, of Whitehaven, and Messrs. Anderson, Wise and Co. of Liverpool, merchants, that the said ship shall be placed under the management of the defendants, to load outwards from Liverpool, with a general

cargo for the Cape of Good Hope, Batavia, Singapore, and, if agreeable to the captain and Robert Wise and Co. in India, to Manilla; the said merchants to ship in the said ship all the goods they may have on consignment to the Cape of Good Hope, Batavia, Singapore, and Manilla, and also use their best exertions, in conjunction with Messrs. Ashley, Brothers, as ship-agents, to procure goods on freight for the above places, both from their own particular connections and merchants generally; the said Mr. John Brockbank to allow the said merchants and brokers to do the ship's business at the custom-house in Liverpool, and to pay the customary commission of 5l. per cent. on all freight procured for the said ship, to the said merchants and brokers; the said owner also engages to receive on board the said ship, goods at the same rate of freight as is currently given to the Cape of Good Hope, Batavia, Singapore, and Manilla; and, on the arrival of the said ship at the Cape of Good Hope, the house of William Anderson, senior, and Co. there, to have the consignment of the said ship during her stay there, which shall not exceed twelve days, and to use their best endeavours to procure goods on freight from thence to Batavia, Singapore, and Manilla; and, on the arrival of the said ship at the said ports of Batavia, Singapore, and Manilla, as may be, the houses of Messrs. Robert Wise and Co., at those ports, to have the consignment of the said ship in India, and to use their best endeavours to *procure good employment, or freight, for [302 the said ship to return to Europe, and in every respect to exert themselves for the interest of the owners of the said ship, as they would for a vessel belonging to Messrs. Anderson, Wise and Co.; for all of which they are to receive the customary commission, inwards and outwards, in India; and it is further agreed, that the said ship shall call at the ports of Batavia and the Cape of Good Hope, on her passage to Europe, if required by the said merchants, and that the said ship shall be consigned to Robert Wise and Co., and William Anderson, senior, and Co., respectively, on the said homeward voyage. Should the ship return to London or Liverpool, Anderson, Wise and Co., at those respective ports, are to transact the business inwards.

“The ship not to be detained in Batavia longer than fifteen days.”

Nathaniel Harmer was, at the time of executing the said agreement, the captain and master of the said vessel, for the voyage in the said agreement mentioned; and, on the 2d May, 1831, before sailing on the said voyage, he received from the defendants the following letter of instructions:

“*Liverpool, 2d May, 1831.*

“Captain N. Harmer,—We are of opinion that Messrs. Robert Wise and Co., Singapore, will have a return cargo ready for you on your arrival there. Our shipments here being completed, we have to request that you will proceed forthwith direct to the Cape of Good Hope, and on your arrival there you will immediately call upon *our managing partner, Mr. W. G. Anderson, of the firm of W. Anderson, senior, and Co.*, and deliver to him all our letters and parcels directed to the said firm, and follow such

directions there as he may give you regarding such part of the cargo as is
 *303] consigned to his firm, and which he requires to be landed there, *and
 we shall be glad to learn that you and he co-operate together for the
 general good of all parties. After landing that part of your cargo intended for
 the Cape of Good Hope at that colony, and after taking such cargo as Messrs.
 W. Anderson, senior, and Co., may ship in you, or desire to ship in you,
 you will please to proceed on direct to Batavia, and on your arrival there
 you will immediately call upon our managing partner there, Mr. William
 Davis, of the firm of Robert Wise and Co., and deliver to him all our
 letters and despatches, and parcels, and follow such instructions there as he
 may give you, regarding such part of the cargo as he requires to be landed
 there. It is of importance that every exertion is made on your part to
 reach the ports of your destination as early as possible, and to this we beg
 your especial attention: you are limited to twelve days' stay at the Cape
 of Good Hope, and fifteen days at Batavia. After the expiration of the
 time of your allowance at those ports, you will proceed direct on your
 voyage until your arrival at Singapore, when you will immediately wait
 upon Mr. Boustead, our managing partner there, whose instructions as to
 the delivery of the remainder of the outward cargo, and your future move-
 ments with the vessel, you will please follow. We request that you may
 have all your pattern boxes and parcels ready for delivery at the Cape of
 Good Hope and Batavia, the moment you arrive at those respective ports.
 You will please call at Batavia on your passage home, and take on board
 what specie Robert Wise and Co. may have to ship on their account, and
 what they may procure for you; after which, proceed direct to the Cape
 of Good Hope, for the purpose of trying that market with your return cargo.
 Should it suit you, you will land what William Anderson, senior, and Co.
 require: you will fill up, we expect, what room you may have for your dis-
 *304] charging port in Europe; *after which you will proceed direct to the
 port of your destination, and await our orders.

“ Your obedient servants,

“ ANDERSON, WISE and Co.”

The vessel was placed under the management of the defendants to load
 outwards, according to the terms of the above agreement of the 5th of
 March, 1831, and was accordingly loaded outwards with a general cargo,
 according to the terms of the said agreement; and Captain Harmer sailed
 with the said outward cargo, and on the 1st of November arrived at Singa-
 pore, where such part of the outward cargo as was consigned to that place
 was unloaded, and other goods were, by the defendants' house there, ship-
 ped on board for the homeward voyage of the said ship, among which were
 657 bags of coffee for London, for which the defendants took from the
 captain three bills of lading deliverable to shipper's order, one being for
 388 bags marked D. T., one for 254 bags marked S. T., and one for 15
 bags marked X. T. The bills of lading were in the same form; and the
 one, for the 254 bags, was as follows:—

"Shipped, in good order and well conditioned, by Robert Wise and Co., in and upon the good ship or vessel called The Lady Gordon, whereof is master for this present voyage Nathaniel Harmer, and now riding at anchor in the roads of Singapore, and bound to London, to say, 254 bags of coffee weighing net 252 packets 50 catties, being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned at the aforesaid port of London, (the act of God, &c., &c., excepted,) unto order or to assigns, he or they paying freight for the said goods at the rate of 7*l.* sterling per ton of 18 cwt., with primage and average accustomed. In witness whereof, the said master or purser of the said ship hath affirmed to four *bills of lading, all of the same tenor and date, the one of which bills being accomplished, the others to stand void. Dated at Singapore, November 10th, 1831. [*305

"Weight and contents unknown to

"N. HARMER."

The defendants also shipped another parcel, of 129 bags of coffee, marked M. Q., under a bill of lading to the same effect as the foregoing.

Before the sailing of the vessel from Singapore, a letter was given by the said Edward Boustead, the managing partner of the defendants' house at Singapore, to Captain Harmer, to be taken by him to Messrs. Anderson, senior, and Co., Cape Town, Cape of Good Hope. This letter, dated "Singapore, 12th November, 1831," and addressed to Messrs. William Anderson, senior, and Co., Cape Town, Cape of Good Hope, after noticing, amongst other things, some other goods sent by The Lady Gordon, proceeds as follows:—

"We likewise enclose you particular manifest of the produce we have shipped in The Lady Gordon, both for England and The Cape; and have to inform you that you are at liberty to land all or any part of $\frac{\times}{D.T. \frac{211}{111}}$ bags of coffee shipped to the address of Messrs. John Dugdale and Brothers, Manchester, provided you can obtain a price which will enable you to remit in specie or good bills, or something that you are certain will pay as well, at an exchange of at least 3*s.* 6*d.* per dollar, per Lady Gordon, or on a very early opportunity. If you cannot do this, you will have the goodness to allow it to go on. The amount stated in the manifest includes all charges here, to which you will have to add freight and charges with you. The freight is 7*l.* per 18 cwt. We do not think it is likely Captain Harmer will be able to get at any of the coffee of this mark; but if you can, you will be so good *as to endorse on his bill of lading what you may land, and advise [*306 Messrs. John Dugdale and Brothers what you have done. You will also please correspond with George Jackson and Messrs. Jackson and Co. regarding the cassia. Messrs. Sutherland and Brothers are at liberty to land their coffee at The Cape, if Captain Harmer can discharge it conveniently, not otherwise. If you sell any of John Dugdale's coffee, and remit the proceeds per Lady Gordon, we think you ought to provide in-

insurance at The Cape, unless you had an opportunity of advising them of your intention to remit. You will also advise Messrs. Horrocks, Jackson, and Co., and George Jackson, regarding insurance. We have nothing further of importance to communicate; and, being anxious to get The Lady Gordon away, we remain, &c.,

P. P. ROBERT WISE and Co.

EDWARD BOUSTEAD.

"P. S.—We omitted to say in the body of this letter that we sent you 22 boxes cassia, signed as per enclosed invoice and bill of lading, for account Messrs. Anderson, Wise and Co., London, which please dispose of, and remit the proceeds in such manner as you may deem most proper for their interests."

The three first-mentioned bills of lading were specially endorsed by the said Edward Boustead on behalf of the defendants at Singapore, without the knowledge of Captain H. or J. Brockbank, to certain persons in London, to whom the parcels of coffee in those bills respectively mentioned were respectively consigned by the defendants' house at Singapore, as returns of proceeds of goods sold by their Singapore house for them respectively; and the bills of lading so endorsed were transmitted by the defendants to those persons respectively.

Messrs. John Dugdale and Brothers were the consignees entitled to the *307] 388 bags; Messrs. Robert *Thompson and Sons, to the 254 bags, and Mr. Douglas, to the 15 bags. The ship left Singapore on her homeward voyage to London, and, according to her instructions, called at the Cape of Good Hope, which she reached on the 23d of January, 1832; and, according to the agreement and instructions set forth in the declaration, the ship was consigned there to W. Anderson, senior, and Co., The Cape house of the defendants.

After the arrival of the vessel at Cape Town, on her homeward voyage, the said 657 bags of coffee, together with the said 129 bags of coffee which belonged to the defendants, were landed and afterwards sold at Cape Town; and the said landing and sale gave rise to the dispute in the present action; and, as the facts relating thereto are disputed, such facts, and many other facts relating to the case are to be taken from the following documentary evidence, which is to be taken as proof of any facts which the court, placing themselves in the situation of a jury, shall think fit to infer therefrom, subject to the objection hereinafter mentioned, if valid and sufficient as to the admissibility of the deposition of W. G. Anderson.

The above-mentioned documentary evidence is contained in the appendix to this case, and is to be considered part thereof, subject to the objection above referred to, and consists of—first, the admission and the documents thereto annexed—secondly, the examination of Captain Harmer, taken *vidæ voce* before Mr. Raincock—thirdly, the depositions taken under a commission at the Cape of Good Hope in the year 1838—and, fourthly, the depositions taken under a commission at the Cape of Good Hope in the year 1834,

which are to be used to the extent in the admissions in this cause agreed upon, and no further.

The depositions of W. G. Anderson, taken under the commission in the year 1838, is only to be received or *taken as part of the case in the event of the court thinking that his evidence was admissible for the defendants, the plaintiff objecting that he was interested and incompetent, and that his evidence cannot be received; and, if his deposition under that commission be rejected, his deposition under the commission of 1834 is also to be withdrawn. [308]

On the 1st of June, 1832, The Lady G. arrived in London; Messrs. John Dugdale and Brothers, to whom the said 388 bags of coffee were consigned as aforesaid, afterwards brought an action against J. Brockbank for the non-delivery thereof, and recovered, as and for their damages and costs, from J. Brockbank, 945*l.* 10*s.*; and the said sum of 945*l.* 10*s.* damages and costs was paid by the plaintiff's intestate to the attorneys of Messrs. John Dugdale and Brothers in that action.

Messrs. Robert Thompson and Sons, to whom the said 254 bags of coffee were consigned as aforesaid, commenced an action against J. Brockbank for the non-delivery thereof, to compromise which the said J. Brockbank paid, in November, 1836, 464*l.* 10*s.* 11*d.*

The value of the fifteen bags in London would have been *l.*(a)

The question for the opinion of the court is, whether or not the plaintiff is entitled to recover. If the court are of opinion in the affirmative, the verdict is to stand; and, if there be any dispute as to the amount of damages, they are to be settled by Mr. F. R. If the court are of opinion in the negative, a nonsuit is to be entered, or such verdict on the respective issues as the court shall direct.(b)

Amongst the documents, set out in the appendix, were :—

A certificate of survey of The Lady Gordon, made at *the Cape of Good Hope, on the 25th of January, 1832, is as follows:— [309]

“On this, the 25th day of January, 1832, before me, John Samuel Mer-
rington, of Cape Town, Cape of Good Hope, notary public, duly admitted
and sworn, and the witness after mentioned, personally appeared James
Smith and George Herbert respectively of Cape Town, master mariners,
who did declare, testify and say for truth, that, at the instance and request
of Nathaniel Harmer, master of the ship Lady Gordon, of Whitehaven, now
lying at anchor in Table Bay, they yesterday repaired on board the said
ship for the purpose of holding a survey on some coffee, part of her cargo
destined for London, said to have been found heated while discharging The
Cape cargo; and, having thereupon examined as many bags as could be
got out, they found the same in apparent good order, and free from any
damage by salt water; but warm to the touch, whereupon they caused
several of the bags to be cut, and then found the coffee to be mouldy, dis-
coloured, and much heated; wherefore they recommended it, as most for

(a) Sic.

(b) Vide *anté*, 299, 300, *post*, 315 (a).

the interest of all parties concerned, that all the coffee that may be found in a similar state should be discharged and sold at this place. And they lastly declared that the damage aforesaid is not to be in any manner ascribed to any defect in the stowage, or neglect on the part of the officers or crew of the said ship."

A second certificate of survey, made on the 10th of February, wherein the surveyors, merchants at The Cape, stated "that they found the whole of the coffee to be in a heated state, and much deteriorated, though the bags were in apparent good condition; wherefore they recommended, as most for the advantage of the parties interested, that the coffee should be forthwith landed and sold, as a measure necessary to prevent further deterioration, and probably total loss; and they further declared *that they were of opinion that the coffee, in its heated state, could not be carried on towards its destination at London, without danger to the ship or cargo from combustion."

And the evidence of W. G. Anderson taken upon interrogatories at the Cape of Good Hope, in 1834 and in 1838, which tended to show that the coffee was not landed at his instance, but in consequence of opinions expressed by the surveyors as to its heated condition.

In these examinations, Mr. Anderson expressly denied he was a partner in the firm.

The case was argued in last Michaelmas and Hilary terms.(a)

Bompas, Serjt., (with whom was *Crompton*,) for the plaintiff, argued, that it appeared, from the documentary and other evidence in the case and appendix, that the defendants had and exercised the entire and exclusive management of and control over the ship *Lady Gordon*, as to the loading, unloading, and freighting the same, and the disposition of her cargo; and that the unloading and landing of the 657 bags of coffee at the Cape of Good Hope, and the sale of the same there, took place solely under the authority, and by the direction and command, of the defendants, and not by the license or authority of the intestate, as alleged in the second plea; and that the landing and sale of the said coffee was the wrongful act of the defendants, there being nothing to show that the coffee might not have safely reached its destination; and that thereby the plaintiff had sustained the injury complained of. Upon these points he cited *Abbott on Shipping*, page 326, 6th edit., and *Freeman v. The East India Company*, 5 B. & A. 617, 1 Dowl. & Ry. 234.

*311] He also contended that the coffee in question was the special property, and in the custody, of the intestate, and that he had a sufficient property therein to maintain *trove* (citing *Arnold v. Jefferson*, 1 Lord Raym. 275, 2 Salk. 654, Lord Holt, 498, and distinguishing *Holliday v. Camself*, 1 T. R. 658; that the facts proved, amounted to proof of a conversion by the defendants without the leave or license of the intestate;

(a) 22d and 23d November, 1843, 17th and 19th January, 1844, before Tindal, C. J., Coltman, Maule, and Erskine, Js.

Stancliffe v. Hardwick, 2 C., M. & R. 1, 3 Dowl. P. C. 762; *Vernon v. Shipton*, 2 M. & W. 9; and that the plaintiff was entitled to the verdict upon each of the issues.

He further contended, that W. G. Anderson was an interested witness, as being a partner of the defendants, and, therefore, that his depositions, taken under the commission in 1834 and 1838, were inadmissible; and that the defendants were estopped from disputing the fact of the partnership by the admission contained in their letter of instructions.

Sir *Thomas Wilde*, Serjt., (with whom were *Tomlinson* and *Cowling*,) for the defendants, argued that it was not by their act that the coffee was unshipped and disposed of at The Cape; nor did they convert it to their own use as alleged; that whatever took place there was done with the license and permission of the intestate by Harmer, his captain and agent; that the defendants had not, on that occasion, the management and control of the ship, within the meaning given to these words in the first count of the declaration; that Douglas did not recover against J. Brockbank the intestate, and that J. Brockbank was not obliged to pay the sums mentioned in the first count, for the reasons and on the grounds alleged therein.

With respect to the second count, he contended, that the coffees were not the goods of the intestate, as *respected the defendants, and therefore, that the defendants were not liable in trover; and that there was no evidence of any conversion. Upon this point he cited *Greenway v. Fisher*, 1 C. & P. 190. [*312]

He further contended that the depositions of W. G. Anderson were admissible, and that the defendants were not estopped by the statement contained in the letter of instructions; for which he cited *Barker v. Stubbs*, ante, Vol. I. p. 44, 1 Scott, N. R. 131; *Russell v. Blake*, ante, Vol. II. p. 374, 2 Scott, N. R. 574; *Poole v. Palmer*, 9 M. & W. 71; *Kell v. Nainby*, 10 B. & C. 20; *Glossop v. Colman*, 1 Stark. N. P. C. 25; *Parsons v. Crosby*, 5 Esp. N. P. C. 199; *Ward v. Haydon*, 2 Esp. N. P. C. 552, and 3 Starkie on Evidence, p. 804, 3d edit.

TINDAL, C. J., now delivered the judgment of the court. (After stating the pleadings, his lordship proceeded as follows):—

The cause came on for trial at the Middlesex sittings after Michaelmas term, 1841, when a verdict was found for the plaintiff for the damages in the declaration, subject to the opinion of the court on a case, which stated certain facts wherein the parties agreed, and which referred to the evidence which accompanied the case as to those facts whereon the parties differed, which, the case provides, is to be taken as proof of any facts which the court, placing themselves in the situation of a jury, shall think fit to infer therefrom; subject to an objection to the admissibility of the evidence of William George Anderson, who had been examined on interrogatories for the defendants, on the ground of his being an interested, and therefore an incompetent, witness.

It will, we think, be convenient, first to consider this question of the

*313] competency of the witness, Anderson, *before entering into the other questions which have been raised in the case. The objection arises thus: the letter of instructions, sent by the defendants to the captain, speaks of the witness as "our managing partner," and it was contended for the plaintiff that this description was conclusive against the defendants, that he was an interested witness at the time of his examination, and therefore incompetent; notwithstanding, he had, in his examination, in effect, denied having been a partner with the defendants.

We think, however, that the description given by the defendants in their letter of instructions, is not conclusive on them, as to the point that W. G. Anderson was an interested witness at the time of his examination; and that with respect to this objection, the plaintiff cannot be in a better situation than if the matters stated by the witness in respect of his interest had been stated in an examination on the *voir dire*; and, on looking at what was so stated, we are of opinion that the witness was not, in fact, interested, on the ground suggested. His evidence, therefore, ought to be taken into consideration, together with the other evidence and facts of the case.

The other questions raised in argument were principally questions of fact with regard to which the court has, by the agreement of the parties, to discharge the office of a jury. It is not unusual for a special case to contain such an agreement; and it is often convenient that it should do so, in order to enable the court to draw inferences of fact from other facts agreed on, or from documents not in dispute, and to obviate the necessity of requiring, in a special case, the great precision which is required in a special verdict. But where, as in the present instance, the principal questions are questions of fact, to be decided on the conflicting testimony of witnesses, whose credit is made matter of question, we think the court is placed, to an *314] inconvenient *degree, in the situation of a jury; and we do not wish this case to be considered as a precedent to be acted on in this respect.

It appears, however, to us upon the matters admitted in the case, and on the evidence as to those in dispute, that the facts, as far as it is material to state them, are, that the ship proceeded on the voyage mentioned in the agreement under the direction of the defendants, so far as the agreement conferred it upon them; but that the defendants did not, to any further extent, have or assume the management or control of the ship and cargo; the letter of instructions, as it appears to us, not going beyond what the agreement enabled the defendants to do, and the dealing with the coffee in question, at the Cape of Good Hope, not being in respect of any assumed rights as managers of the ship and cargo, but under a different assumption.

It further appears to us, that the coffee in question was shipped by the defendants' agents at Singapore, and made deliverable to their order in London, by bills of lading signed by the captain to that effect; that the captain was induced, by the representations of the defendants' agent at Singapore, and The Cape, to believe, and did believe, that it was the pro-

perty of the defendants, or that they were entitled to exercise the rights of the owners of the coffee, and consequently that he might lawfully permit, and ought to permit, the defendants to receive it at The Cape, and could only insist, on the part of the ship-owner, on having his full freight paid to London, provided he was able and willing to carry it on. The coffee, as it appears to us, was sold at The Cape, and the proceeds received by the defendant's agent, under this persuasion on the part of the captain, and under an assumption of right on the part of the agent to exercise the powers of ownership; and that it was not sold because it could not be conveyed, or because *the captain would not convey it to London. For the cap- [*315
tain, in insisting on the freight for the whole voyage to London being paid, and the defendants' agent in agreeing to it, appear to us to have treated the coffee as goods which the captain had the power of conveying to London, and the right to do so, unless paid the full freight, and not as goods which he could not, or would not, carry to their destination; in which case he could have no ground for such claim. It appears, therefore, to us, that the coffee was wrongfully sold by the agent of the defendants at The Cape, and that the intestate was thereby made subject to the liability of paying damages for the non-delivery to the owners, who claimed, in London, under the bills of lading; and that the intestate having, as ship-owner, the possession of, and a special property in, the coffee, the plaintiff is entitled to recover on the count in trover, in respect of the injury to that special property; but as to the first count of the declaration, we are of opinion that the facts put in issue by the third plea are not proved, and that the defendants are entitled to judgment on that count. On the whole, therefore, the judgment will be for the plaintiff, on the second, and for the defendants, on the first, count. Judgment accordingly. (a)

(a) The special case (supra, 308,) provides that a verdict shall be entered on the respective issues, as the court shall direct. It may be inferred, from what fell from the court in pronouncing their judgment, that the verdict was to be entered for the plaintiff on the second, fourth, and fifth issues, and for the defendants on the third, and perhaps (*tamen quare*) on the first. Vide supra, 299, 300.

*KAVANAGH v. GUDGE and Others. Feb. 12. [*316

A. let certain premises to B. by an agreement which contained the usual clauses for payment of rent and for repairing the premises, and also a clause, that in case of non-payment of the rent or non-performance of the conditions, it should be lawful for A., without any demand, to enter upon and take possession of the premises, and expel B. therefrom without any legal process; and that in case of such entry and of any action being brought for the same, the defendant might plead leave and license of B. to A. for the entry or trespasses complained of.

In an action of trespass by B. against C. for breaking and entering, &c., and assaulting plaintiff, C. pleaded leave and license. It appeared that rent being in arrear from B. to A., C., under a written order from A., had entered and forcibly expelled B. The foregoing agreement was given in evidence.

Held, that the plea was sustained by the evidence.

Held, also, that as the plaintiff had not new-assigned any excess, the assault was merely an aggravation of the principal trespass, and was covered by the plea.

TRESPASS, for breaking and entering the dwelling-house of the plaintiff, expelling her therefrom, seizing her goods, and assaulting and beating her, &c. (a)

Pleas; first, not guilty; secondly, leave and license; (b) thirdly, as to the entering and seizing the goods, a justification under a distress for rent due to one Temperance Arden. (c)

At the trial before PARKE, B., at the last Croydon assizes, the trespasses mentioned in the declaration were proved by the plaintiff, and the justification set up in the third plea was proved on the part of the defendants, who gave the following evidence in support of the plea of leave and license.

The plaintiff held the premises as tenant thereof, from year to year, to Temperance Arden, at the rent of 30*l.*, payable half-quarterly, under an agreement in writing. Stipulations containing the usual clauses as to rent and repairs, and a clause by which it was agreed, "that, if the rent or any part
*317] thereof should be unpaid on any day *on which the same should become due, or within ten days afterwards, or if the plaintiff should not at all times observe and keep the several conditions and agreements therein before mentioned, or quit and deliver up possession of the house according to notice, then, in either of such cases, and without any demand whatsoever, it should be lawful for T. Arden and her agents immediately to enter upon and take possession of the house and premises, and the plaintiff and all persons claiming under her, for ever to expel and amove therefrom, without any legal process whatsoever, and as effectually as any sheriff might do, in case T. Arden had obtained judgment in ejectment for the recovery of possession thereof, and a writ of *habere facias possessionem*, or other process, had issued on such judgment, directed to such sheriff in due form of law; and that, in case of such entry, and of any action being brought, or other proceedings taken, for the same by any person whatsoever, the defendants might plead leave and license in bar thereof, and that agreement might be used as conclusive evidence of the leave and license of the plaintiff to T. Arden, and all persons acting therein by her order, for the entry or trespasses, or other matters complained of in such action or other proceedings."

Three quarters, rent being in arrear, the defendants, under a written authority from T. Arden, entered and distrained, and turned the plaintiff and her lodgers and their goods out of the house, and kept possession.

A verdict was taken for the plaintiff on the first issue, and for the defendants on the two other issues; and the jury assessed the damages for the trespasses not covered by the third plea, at 50*s.*, leave being reserved by the learned judge for the plaintiff to move to have the verdict on the second issue entered for her, with 50*s.* damages.

(a) See the declaration set out, *antè*, Vol. V. 726.

(b) See *Matthew v. Ollerton*, Comberb. 218.

(c) A fourth plea, setting forth a special justification, was adjudged bad on demurrer. *Vide antè*, Vol. V. 727.

Bompas, Serjt., in Michaelmas term last, moved accordingly, or for judgment *non obstante veredicto* upon *the second issue. The evidence [318 was not admissible under that issue. The alleged license rests upon an agreement operating as a lease with a clause for further assurance. The rule of law is, that if a matter is not pleaded according to the express words, it must be pleaded according to its legal effect. A plea of leave and license to enter admits the possession to be in the plaintiff. But here, the entry, if lawful, had the effect of determining the tenancy and vesting the possession in the defendant; which is inconsistent with the continued possession by the plaintiff admitted by the second plea. If the plea of leave and license will let in the defence set up in this case, there is no reason why every species of justification may not be given in evidence under this plea. But as Mr. Baron PARKE observed at the trial, a man may have a good defence, and not have the good fortune to plead it. [MAULE, J. Suppose an agreement—that a party may declare in assumpsit, and that every thing may be given in evidence under non assumpsit. The rule—*conventio vincit legem* must have some limitation. Such an agreement would not be obligatory on the court.] License cannot be pleaded to a battery. (a)

A rule nisi being granted,

Sir T. Wilde and Channell, Serjts., during last term, showed cause, and *Bompas*, Serjt., was heard in support of the rule (January 19th and 20th). The arguments (b) are sufficiently stated and commented upon in the judgment of the court; which was now delivered by

*TINDAL, C. J., (after stating the pleadings and evidence, *ut supra*,) [319 as follows. The question reserved for the opinion of this court was, whether the plea of leave and license was sustained by this evidence.

On the part of the plaintiff it was argued, that, although the agreement, in terms, conferred upon the lessor and her agents a license to enter and expel the plaintiff in case the rent should be in arrear, yet that the defendants were bound to plead the agreement according to its true legal effect and operation; that the true legal operation of the instrument, under the circumstances proved, was, to confer upon the lessor a right to the exclusive possession of the premises, under a condition of re-entry, by virtue of which the plaintiff's right to possession as tenant had ceased and determined; and that the entry by the defendants was under this claim of right in the lessor; and it was insisted that such a defence was inconsistent with a plea of leave and license, which admits the possession and right to the possession to be in the plaintiff, and justifies the intrusion upon that possession by the defendants under the leave and license of the plaintiff, without setting up any

(a) Vide Comberb. 218.

(b) In which the following authorities were cited.

On the part of the defendants,—*Tuunton v. Costar*, 7 T. R. 431; *Taylor v. Cole*, 3 T. R. 292, 1 H. Bl. 555; Com. Dig. tit. *Pleuder* (3 M. 35); *Turner v. Meymott*, 1 Bingh. 158, 7 J. B. Moore, 574; *Hilary v. Gay*, 6 C. & P. 284; *Newton v. Harland*, ante, Vol. I. p. 644; 1 Scott, N. R. 474; *Bennett v. Allcott*, 2 T. R. 166.

On the part of the plaintiff,—Vin. Abr. tit. *License* (G.), and note (d) to *Altwood v. Taylor*, ante, Vol. I. p. 281

exclusive right of possession in another. It was further argued that the express consent of the plaintiff by the very terms of the agreement, that the defendants might plead leave and license, and that the agreement might be used as conclusive evidence thereof, could not alter the rules of law by which the forms of pleadings, and the effect of evidence under them, were regulated.

We assent to the two general positions, that the defendants were bound to plead their defence under this agreement according to its legal effect, and that, if the clause relied on was not, in its legal effect, a license to enter, &c., the agreement between the parties that it might be pleaded and given in evidence as such, would not entitle the defendants to retain the verdict *320] on that issue. It is obvious, however, from the peculiar wording *of this agreement, that it was the intention of the plaintiff to give the license stated in the plea, and that she has employed the most apt words that could be selected for carrying that intention into effect.

The question therefore is, whether the legal effect of the language employed is such as to confer some right and interest consistent with the plain and literal meaning of the words. It is to be observed that there is no provision, that, upon non-payment of the rent, the lease shall be void, so as to strip the tenant of her right to possession before the entry of the lessor: the lessor, therefore had no right to the possession, except under the license thus expressly given; and it would only be upon her entry that any such right would re-vest in her. Under the old form of pleading, the landlord's right of re-entry under a clause of forfeiture might have been given in evidence under the plea of not guilty; it was not probable, therefore, that any case directly in point should be found in the books; and, accordingly, none was cited at the bar.

The authority that seems most opposed to the defendants' claim, to avail themselves of this defence under the plea of leave and license, is a dictum of the court in the case of *Lord Dudley v. Powles*, M. 5 H. 7, fo. 1, pl. 1, in which the plaintiff's counsel, in arguing against the sufficiency of a plea of leave and license, says, "As if one would plead in trespass, that the plaintiff had licensed him to enter and occupy for the space of a month or quarter of a year, such a plea in that case would not be good, but he ought to say that the plaintiff leased to him, and not that he licensed him, for the matter that follows does not prove a license, but a lease." And the reporter adds: "And this was granted to him by the court. *Quod nota.*" And in the case of *Hall v. Seabright*, 2 Keble, 561, the court is reported to have said, of a license to *321] occupy premises for a specified time, "This is a lease, and *should be so pleaded." That case, however, was decided upon the insufficiency of the plea in other respects, and not upon the ground that the defence was not available under a plea of leave and license. And, in the report of the same case in 1 Mod. p. 14, in answer to an argument by Saunders, that the plea of leave and license was naught, for that a license to enjoy, from such a time to such a time, was a lease, and ought to be pleaded as a lease, and not as a license, TWISDEN, J., is reported to have

said: "It is true, that in the Year-Book, 5 Hen 7, fo. 1, pl. 1, it is said that, if one doth license another to enjoy his house till such a time, it is a lease; but whether it may not be pleaded as a license, I have known it doubted." And it is remarkable, that in Bacon's Abridgment, *Leases*, (K), these cases are cited as authorities for the position (a) that such a license may be pleaded either as a lease or as a license. And in the case of *Jepson v. Jackson*, 2 Lev. 194, which was an action of trespass against husband and wife, for entering the plaintiff's house and continuing there three years, the defendants pleaded, as to two years, not guilty, and as to the third, a license to the husband to enter with his wife and servants, and inhabit there. The plaintiff replied, *non dedit licentiam* to the baron and *f. me*, (b) *modo et formâ*; and both issues were found for the plaintiff, and judgment entered for him. Upon a writ of error this judgment was reversed, because the replication was bad, as taking an immaterial issue; for, it might be true that the plaintiff did not license the husband and wife to inhabit; for such a license would have amounted to a joint lease, and would have survived to the wife; and yet the plea might be also true, that the license was to the husband to enter with his wife and inhabit. If this license to the husband, which, according to the *decision, amounted to a lease, could not also be pleaded as a license, the plaintiff's case, as [322 to the third year, was unanswered, and judgment was rightly entered for him, and ought not to have been reversed. (c)

But, assuming the dictum in the Year-Book to be correct, it does not conclude the question now before the court; for, by the license to occupy, an immediate interest and right to the possession was vested in the lessee; whereas, in the present case, the plaintiff's right to the possession, as tenant, continued until the lessor had availed himself of the license, given by the agreement, to enter and take possession. (d) Under the peculiar wording of this agreement, the entry and the expulsion may therefore be well justified under this form of plea.

It was further urged, that, if the entry and the removal of the goods might be justified under the plea of leave and license, yet that the assault and battery and expulsion could not be so defended. But we think that, as the entry and expulsion were justified by the license, the assault and battery, which are laid merely as aggravations of the principal trespasses, are also covered by it; and that, if the plaintiff meant to avail herself of any excess of force employed in the expulsion, she ought to have new-assigned it.

We are of opinion, therefore, that the rule should be discharged.

Rule discharged.

(a) Sanctioned therefore by Gilbert, C. B., the author of that treatise.

(b) Vide *infra*, 322 (a).

(c) If pleading as a license that which, although a license in fact, enures in law as a lease, is a defect in form cured by the 27 Eliz. c. 5, there would be an informal plea made good by pleading over, followed by a replication bad in substance, as taking issue upon matter not alleged in the plea, unless the words "to the baron and feme" could be rejected as surplusage.

(d) In the case in 5 H. 7, the entry was under a right of possession absolute *ab initio*; in the principal case, it was under a right which, though originally contingent, had become absolute.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
IN
Easter Term,
IN THE SEVENTH YEAR OF THE REIGN OF VICTORIA.

The judges who usually sat in banco during this term were,

TINDAL, C. J.
COLTMAN, J.

ERSKINE, J.
CRESSWELL, J.

REGULA GENERALIS.

IT IS ORDERED, that, for the future, it shall not be necessary to have a warrant of attorney to acknowledge satisfaction of a judgment, or a judge's fiat thereon, but that it shall be requisite only to produce a satisfaction-piece similar to that in use in the court of Queen's Bench; except that, in all cases, such satisfaction-piece shall be signed by the plaintiff or plaintiffs or their personal representatives,^(a) and such signature or signatures shall be witnessed by a practising attorney of one of the courts at Westminster, expressly named by him or them, and attending, at his or their request, to inform him or *them of the nature and effect of such satisfaction-piece before the same is signed, and which attorney shall declare himself, in the attestation thereto, to be the attorney for the person or persons so signing the same, and state he is witness as such attorney; but any judge at chambers shall have power to make an order dispensing with such signature of the plaintiff or plaintiffs or their personal representatives, under special circumstances, as he may think right; and that in cases where the satisfaction-piece is signed by the personal representative of a deceased

^(a) *Quære*, whether the signature of one of several executors is not sufficient; as a release by him would be.

plaintiff, he shall prove his representative character in such way as the master may direct.

DENMAN.

N. C. TINDAL.

FRED. POLLOCK.

J. PARKE.

E. H. ALDERSON.

J. PATTESON.

J. GURNEY.

J. WILLIAMS.

J. T. COLERIDGE.

T. COLTMAN.

T. ERSKINE.

R. M. ROLFE.

W. WIGHTMAN

C. CRESSWELL.

MEMORANDA.

JAMES, Lord ABINGER, Lord Chief Baron of the court of Exchequer, died, upon the Norfolk circuit, on the 7th day of April, 1844.

On the first day of the present term, Sir *Frederick Pollock*, Knt., her majesty's attorney-general, was called to the degree of the coif, and on the following day took his seat as Lord Chief Baron of the court of Exchequer, in the room of the late Lord ABINGER.

On the 15th of April, Sir *William Webb Follett*, Knt., her majesty's solicitor-general, was promoted to the office of attorney-general: and *Frederick Thesiger*, Esq., of the Inner Temple, one of her majesty's counsel, was appointed solicitor-general on the 17th, and shortly afterwards received the honour of knighthood.

*PHILLIPS and Another v. IRVING. April 18. [*325

In a policy on a seeking ship, a detention for a reasonable time for the purposes of the seeking adventure must be allowed; and whether the time is reasonable is to be determined by the state of things at the port where the ship happens to be.

A ship insured, with liberty to touch, stay, and trade at several ports, arrived at one of them on the 3d of June, when some necessary repairs were done to her. On the 2d of September she was ready to take in cargo, but, owing to the state of the freight-market and other difficulties, no cargo was put on board till the 10th of January following: Held, that the delay was not unreasonable, so as to amount to a deviation.

ASSUMPSIT, upon a policy of assurance, dated the 29th of January, 1842, signed by the defendant as chairman of the Alliance Marine Insurance Company, on the ship *Broxbournebury*, at and from London to Bombay, and thence to China, and back to the United Kingdom, with liberty to touch, stay, and trade at all ports and places on this side, at or beyond the Cape of Good Hope.

First plea, that the ship having arrived at Bombay, remained there an unreasonable time: and that the assured did not duly prosecute the voyage insured, and therefore were guilty of a deviation.

Replication, *de injuriâ*.

There were other pleadings in the cause, but they were not material to the question now raised.

At the trial before TINDAL, C. J., at the sittings for London after last term, it appeared that the ship arrived at Bombay on the 3d of June, 1842; that some repairs were necessary, which were completed on the 2d of September; and that the ship was then ready to take in cargo; but that in fact none was put on board until the 10th of January, 1843. The ship was a seeking ship, commanded by one of the part-owners; and it was clearly proved that he could not at an earlier period have obtained a cargo, either for China or the United Kingdom, at a remunerating freight. Several circumstances combined to render freights unusually low at Bombay during the *326] time the ship in question *remained there. Ships that had taken out troops were in want of homeward cargoes, and the disturbance of the trade with China had prevented many ships from sailing thither from Bombay. The latter port was therefore crowded with shipping; and the freights offered would, if accepted, have occasioned a great loss to the owners.

The ship sailed for London on the 22d of March, 1843, but was compelled, from stress of weather, to put in at the Mauritius, when she was found to be so much damaged as not to be worth repairing, and she was consequently abandoned.(a)

It was agreed that it should be reserved for the court to determine upon the facts applicable to the first issue, whether there had been such an unreasonable delay as to discharge the underwriters, and a verdict was returned for the plaintiff with 887*l.* damages, leave being reserved to the defendant to move to enter a nonsuit, or a verdict for himself.

Channell, Serjt., now moved accordingly, and submitted that the delay at Bombay was unreasonable, and amounted to a deviation. [CRESSWELL, J. The Broxbournebury appears to have been a *seeking* ship. The usual course in such a voyage is, that the captain is to do what is reasonable for the owners; and the underwriters subscribe to that risk.(b)] The delay here is accounted for, partly by the necessity for certain repairs, partly by the state of the market; but the underwriters are not to be made liable in respect of the latter. [TINDAL, C. J. The question is, whether the captain waited an unreasonable time with reference to the state of the market, and if he did not, whether the underwriters did not take the risk.] The delay *327] arose from *an *unusual* state of circumstances. The policy was entered into with reference to the *ordinary* state of things. The owners might have made a time policy. [TINDAL, C. J. The captain has authority under the policy "to touch, stay, and trade." It is clear he stayed in this case for the purpose of trade. The question must be whether he did so for a reasonable time. CRESSWELL, J. How are we to know what is

(a) Vide *Benson v. Chapman*, antè, VI. 792.

(b) See *Metcalf v. Parry*, 4 Campb. 123, where it was held that a voyage in a policy, "with liberty to touch at," was a seeking adventure.

the ordinary state of trade at Bombay?] It is clear from the evidence that the circumstances proved were not usual. [TINDAL, C. J. I will show my notes to my brothers, and we will see if the rule ought to go. CRESSWELL, J. It is a very important question to persons engaged in the African trade, where the circumstances vary much.(a)]

The learned serjeant referred to *Mount v. Larkins*, 8 Bingh. 108, 1 M. & Scott, 165. *Cur. adv. vult.*

TINDAL, C. J., on the following day delivered the judgment of the court.

In this case we are of opinion that a rule for entering a nonsuit, or a verdict for the defendant on the first issue, ought not to be granted. (His lordship then stated the pleadings, *ut suprâ.*)

At the trial, the facts applicable to the first plea (which is the only one on which any question is raised) were withdrawn from the consideration of the jury, and it was agreed that the court should decide whether the assured were discharged by the alleged delay. We have, therefore, read the evidence given by the captain *and his mate as to the circumstances under which the ship remained at Bombay. (His lordship stated [*328 the evidence, *ut suprâ.*])

There was nothing to show that, as far as the interests of the owners were concerned, the delay at Bombay was improper. But it was contended, that, although the adventure on which the ship sailed from England may have been prosecuted without any improper delay, as far as the owners were concerned, yet, with regard to the underwriters, the case was different, and the delay was unreasonable and improper, and therefore equivalent to a deviation; and that, as the concurrence of circumstances which rendered freights at Bombay ruinously low, was unusual, it could not be said that the voyage was prosecuted *in the usual course*. It was not, nor could it be denied that the ship might be detained for some time in order to obtain a cargo at a reasonable rate of freight: but it was said that such detention could not, without discharging the underwriters, be extended beyond the time usually required for such purpose. It appears to us, however, that no such rule can be laid down; that the detention, for a reasonable time for the purposes of the adventure insured, must be allowed; and that, whether the time is reasonable or not, must be determined, not by any positive and arbitrary rule, but by the state of things existing at the time at the port where the ship happens to be. It may be collected from numerous cases, that delay before or after the commencement of a voyage insured, is not equivalent to a deviation, unless it be unreasonable; *Hartley v. Buggin*, Park, Ins. 313, 652; *Ougier v. Jennings*, 1 Campb. 505, n.; *Mount v. Larkins*, 8 Bingh. 108, 1 M. & Scott, 165. And we think that no certain and fixed time can be said to be a reasonable or unreasonable time for seeking a cargo in a

(a) In *Phillips on Insurance*, (Boston, 1840,) it is said, "In some voyages, however, it is customary to prolong the risk by touching at intermediate ports; as in India voyages, or others of great length; or by delaying to discharge the cargo immediately after arrival, as in voyages to the coast of Labrador, or of Africa: and the parties are supposed to be acquainted with such custom, and have it in contemplation when they make their contract." Vol. i. p. 480.

*329] foreign port ; but that the time allowed must vary with the varying circumstances which may render it more or less difficult to obtain such cargo. Judging of the facts of this case according to that principle, it does not appear to us that the delay at Bombay was unreasonable. We therefore think that the verdict found for the plaintiffs ought not to be disturbed. Rule refused.

AUGUSTUS NEWTON, Esquire, and LETITIA FRANCIS HENRY,
his Wife, v. ROWE and NORMAN. April 19.

In an action by baron and feme for a libel on the feme, the verdict was against the plaintiffs, and judgment thereon. A *ca. sa.* for the costs was issued against the baron alone. A *ca. sa.* was afterwards issued against both plaintiffs. The baron, who was in custody upon another suit, was charged in execution on the first *ca. sa.*, and was afterwards discharged by order of the insolvent court. The feme was afterwards taken in execution on the second *ca. sa.*, but was discharged by a judge, upon an affidavit that she had no separate property.

Held, that the second *ca. sa.* was not irregular.

Quære, whether there was error in the writ.

Quære, also, whether the plaintiffs had any remedy by *audita querela*.

In this case, which was an action against the proprietors and publishers of the Cheltenham Examiner newspaper, for an alleged libel upon Mrs. Newton, the defendants pleaded not guilty, and several pleas of justification. Upon the trial at the spring assizes for Gloucestershire, 1843, no evidence was offered in support of the latter pleas ; but a verdict was returned for the defendants on the first issue ; and the verdict was thereupon entered for the plaintiffs on all the other issues. A rule nisi for a new trial was obtained by the plaintiffs and afterwards discharged. Upon the taxation of costs, the balance due to the defendants was 73*l.* 18*s.*

On the 15th of June, 1843, a *ca. sa.* directed to the sheriff of Gloucestershire was issued against the plaintiff A. Newton alone, upon the judgment in this action.

*330] *On the 7th of July, a *ca. sa.* directed to the same sheriff was issued against both the plaintiffs upon the same judgment.

On the 27th of July, Mr. Newton, being then in custody in another suit, was charged in execution by the virtue of the first *ca. sa.*

On the 4th of November, Mr. Newton, having previously petitioned the insolvent debtors' court, was discharged by order of that court.

On the 15th of February, 1844, a warrant was granted to the sheriff of Gloucestershire, upon the second *ca. sa.*, whereon Mrs. Newton was arrested and carried to Gloucester jail, whither she was accompanied by her husband, who was detained by the jailer, upon the ground that the warrant was granted against both of the plaintiffs. On ascertaining, however, that Mr. Newton had been discharged as to this action by the order of the insolvent debtors' court, the jailer released him, after having detained him for about half an hour. To this writ the sheriff returned that he had taken

Mrs. Newton, but that he had been discharged by the defendants from executing it against Mr. Newton.

Mrs. Newton was afterwards brought by *habeas corpus* before CRESSWELL, J. ; when, it being sworn that she possessed no property separate and apart from her husband, his lordship ordered her to be discharged.

The plaintiff in person, upon an affidavit of the foregoing facts, now moved that the *ca. sa.* of the 7th of July, 1843, might be set aside for irregularity.

First, a wife cannot be taken for costs in a joint action brought by husband and wife. It is laid down in Black. Com. that, "if judgment be recovered against a husband and wife for the contract, nay, even for the personal misbehaviour of the wife during her coverture, the *capias* shall issue against the husband only ; which is one of the greatest privileges of English *wives."(a) In an *anonymous* case there referred to, which [*331 was trespass of assault and battery, against baron and feme, for a battery done by the feme, the defendants being found guilty, the question was, whether a *quod capiatur* should be entered against baron and feme. And it was resolved that a *quod capiatur* should be against the baron only.(b) [ERSKINE, J., referred to *Pitts v. Meller and Wife*, 2 Stra. 1167 ; *Finch v. Duddin and Wife*, Ib. 1237, and *Langstaff v. Rain and Wife*, 1 Wils. 149, where the court refused to discharge the wife who had been taken in execution upon a judgment against her husband and herself.] In all those cases the action was for a wrong *done by the wife herself.(c) This [*332 is an action for a wrong done to the wife. [TINDAL, C. J. Would it not have been error, if the writ had not followed the judgment, and the *capias* had been against you alone ?] It is submitted that it would not. If there were two plaintiffs, and one were privileged as a member of parliament, and judgment were obtained against both, the writ would not issue

(a) Vol. iii. p. 414, (citing Cro. Car. 513 ;) 3 Steph. Com. 647.

(b) In *Mayo v. Cogshill*, Cro. Car. 406, (S. C. nom. *Mayow v. Cockshott*, 1 Roll. Abr. 221, tit. *Amercement* (D.), pl. 8,) error was brought upon an *ejectione firmæ* against baron and feme. The defendants had pleaded *not guilty*, and the feme was found guilty, and the baron not guilty ; and the judgment was against baron and feme, *quod capiatur*, and for this cause the error was assigned, because the judgment ought to have been against the feme, *quod capiatur*, and not against the baron, where he is acquitted ; for he ought not to be imprisoned for his wife's offence. But *Rolls (Rolle)* for the defendant in the writ of error, moved that it is not any error, and that the judgment in this case ought to be against them both, *quod capiatur* ; for it is only for the fine to the king, and the imprisonment is no longer till the fine is paid ; and the baron ought to pay it, for the feme cannot.

And Broom, the secondary, said, that so are all the precedents of this court (B. R.) ; wherefore the court here awarded accordingly, that notwithstanding this error (assigned,) the judgment should be affirmed. (This judgment was reversed upon another ground.)

See also *Percy v. Bardolf*, Cro. El. 381 ; S. C. nom. *Bardolph v. Perry and Wife*, Sir F. Moore, 704 ; *Hales v. Whyte*, Cro. Jac. 203 ; *Wood et ux. v. Doctor Suckling*, Ib. 439 ; 1 Roll. Abr. 221, pl. 8.

But in 1 Roll. Abr. 221, pl. 7, it is said, "In trespass against baron and feme, if the feme be found guilty and the baron not guilty, the baron shall not be imprisoned ; 22 Ass. 87, (22 Ass. 105, pl. 87,) adjudged."

And see Vin. Abr. tit. *Amercement* (Q.), (C. a.), (D. a.)

(c) *Pitts v. Meller* was trover against husband and wife ; *Finch v. Duddin*, and *Langstaff v. Rain*, were for a battery by the defendant's wife.

against both. [TINDAL, C. J. Why not? The sheriff would not execute it against both. The writ would do no harm.(a)] In *Raynes v. Jones*, 9 M. & W. 104, 1 Dowl. N. S. 373, it was held, that where one of the several defendants, having been arrested on a *ca. sa.*, had been discharged under the insolvent debtors' act, his goods could not be afterwards seized under a *fi. fa.* issued against him and the other defendants; yet in that case the *fi. fa.* followed the judgment. [TINDAL, C. J. That case was so decided, as stated by Lord ABINGER, C. B., upon the express clause in the act of parliament,(b) declaring that where once a party has been discharged under the act, no writ of *fieri facias* shall issue against him on any judgment for any debt with respect to which he was entitled to the benefit of the act. You have to show that at common law it would not have been error, if the writ had not followed the judgment.] Here, there might have been a suggestion on the record, that the female plaintiff was clothed with a protection. She was discharged out of custody on the authority of *Hoad v. Matthews*, 2 Dowl. P. C. 149, *and *Sparkes v. Bell*, 8 B. & C. 1, *333] 2 Mann. & Ryl. 124. The cases stand upon a very different footing, where the wife is a joint-defendant in respect of her own act, either *dum sola* or during coverture. The principle is, that a party should be liable for his own act. The wife is not generally bound even by her own joint acts with her husband. In Com. Dig. tit. *Baron and Feme* (H.), it is said, "If husband and wife convey by deed, acknowledged by them to be enrolled, it does not bind the wife; for there was no suit depending, upon which she might be examined." (c) It is not disputed that the judgment against both plaintiffs is regular, but there is no necessity that the writ should follow the judgment, and having done so in this case, it is submitted that it is error. [TINDAL, C. J. Then you had better bring a writ of error. That is the proper course, it being a doubtful point.]

Secondly, the writ is irregular, by reason of a former writ having been issued against the husband alone, under which he was afterwards charged in execution, and subsequently discharged by order of the insolvent debtors' court. In February, 1844, when Mrs. Newton was arrested, the husband could not be legally arrested, nor could the writ against him and the wife at that time be legally delivered to the sheriff. [TINDAL, C. J. How can we set aside the writ upon that ground? The delivery of the writ to the sheriff is not the act of the court. An irregular delivery does not make the writ itself irregular; and, as both of the plaintiffs have been discharged, there is no execution to set aside.] In *Raynes v. Jones* the writ was set aside. [COLTMAN, J. There, the writ was irregular at the

(a) See *Cassidy v. Stewart*, antè, Vol. II. p. 437, and notes to that case. See also *Taylor v. Lord Stuart de Rothesay*, antè, Vol. IV. p. 388; *Davis v. The Earl of Lichfield*, 1 Dowl. N. S. 363; *Houlditch v. The Earl of Lichfield*, antè, Vol. IV. p. 770.

(b) 1 & 2 Vict. c. 110, s. 19.

(c) Citing 10 Co. Rep. 43 a, 2 Inst. 673. This is stated in 10 Co. Rep. by way of exemplification of the rule previously laid down, that "generally, the wife shall not be bound by any act to convey her inheritance or freehold, unless she be examined, and she can be examined only upon writ."

*time that it issued; for the defendant had previously been discharged by the insolvent debtors' court. TINDAL, C. J. I think there is nothing in this point. COLTMAN, J. You may possibly have a remedy by *Auditâ querelâ*.](a)

Per Curiam;

Rule refused.

(a) "An *auditâ querelâ* is a writ to be delivered against an unjust judgment or execution, by setting them aside for some injustice of the party that obtained them, which could not be pleaded in bar to the action; for if it could be pleaded it was the party's own fault, and therefore he shall not be relieved, that proceedings may not be endless." Bac. Abr. tit. *Auditâ Querelâ*. But it lies only where the party is in execution or in danger of it, and has no other means to take advantage of it. Com. Dig. tit. *Aud. Quer.* (A.), cit. F. N. B. 102, H. And see ib. 233, A.; *Ascue v. Fuliambe*, Cro. El. 233; Mann. Exch. Prac., 1st ed., 376.

In the principal case neither of the plaintiffs was in execution or in danger of it; and they had taken advantage of the irregularity of the execution, by obtaining their respective discharges.

BLOODWORTH v. GRAY. April 19.

To say of a person that he has the venereal disease, is actionable, *per se*.

CASE, for defamation. 'The first count, after stating the intention of the defendant to be, to cause it to be suspected and believed that the plaintiff, at the time of the committing, &c., was infected with the French pox, otherwise called the venereal disease, laid the words as follows: "He (meaning the plaintiff) has got that damned pox (meaning the French pox, otherwise called the venereal disease,) from going to that woman on the Derby road." In the second count, the words alleged were,—“Ah! that damned fellow Bloodworth! I am credibly informed that he has got the pox.” In the third count, “He has got it,” (meaning, &c.)

*The declaration laid, as special damage, that one Palmer, who had been surety for the plaintiff for the rent of his farm, had, in consequence of the slander, withdrawn from his suretiship; and that, by means of the premises, the plaintiff's wife died, whereby the plaintiff had lost her comfort, assistance, and services; (a) and the plaintiff fell sick and underwent great pain of body, &c.

Plea, not guilty.

At the trial of the cause before GURNEY, B., at the last Leicestershire assizes, it appeared that the plaintiff, who was a farmer, was the son-in-law of the defendant, a major-general on half-pay; and that the marriage had taken place without his consent. The words were proved as laid, but the proof of special damage wholly failed. It was contended, on the part of the defendant, that the words were not actionable *per se*; but the objection was overruled, and the plaintiff recovered a verdict of 50*l.* da-

(a) As to the effect of the death, see *Higgin's case*, Noy, Rep. 18, S. C. 2 Roll. Abr. 557, pl. 31; *Ib.* 568, pl. 2, 3; *Anon.* cited 1 Keble, 847; *Fetter v. Beale*, 1 Salk. 11; *Baker v. Bolton*, 1 Campb. 493.

mages; leave was, however, reserved to the defendant to move to enter a nonsuit.

Channell, Serjt., now moved accordingly; but he admitted the authorities were against him. He referred to Com. Dig. tit. *Action upon the case for defamation*, (D. 29,) and *Carslake v. Mapledoram*, 2 T. R. 473.

TINDAL, C. J. This case falls within the principle of the old authorities.

Per curiam;

Rule refused.

***336] *WILLIAM CURLING and Others v. MARGARET ROBERTSON. April 19.**

A., B., and C. were part-owners of a ship, C. being the managing owner. In June, A., on his own account and as agent for B., contracted for the sale of their shares with C., on behalf of D. C. accepted a bill for part of the price. In August, B. executed a bill of sale from himself and A. to C. in *bonâ fide* pursuance of the former contract. C. after the original contract of sale, ordered some repairs to the ship, which were done before the bill of sale was executed: *Held*, that B. was not liable for such repairs.

DEBT, for work and materials; money paid; the use and occupation of a dock and premises, &c., whilst a certain ship or vessel of the defendant was undergoing repair therein, and on an account stated.

Plea, never indebted.

At the trial before TINDAL, C. J., at the sittings for London after last term, the following facts appeared.

The action was brought to recover 1398*l.* 14*s.* for necessary repairs done by the plaintiffs, who were ship-builders at Limehouse, to a ship called the *Fergusson*, between the 10th of July, 1840, and the 5th of August following.

Previously to the month of June, 1840, the defendant, her brother, (William Robertson,) and one Bishop, were joint registered owners of the *Fergusson*. The defendant held 10 sixty-fourths shares, W. Robertson 22 sixty-fourths, and Bishop 32 sixty-fourths, (being one half of the whole vessel.) By an endorsement on the register it appeared that, on the 30th of March, W. Robertson had transferred the ten shares to the defendant; that on the 9th of September, by a bill of sale, dated the 13th of July previous, he transferred his shares to one Virtue; and that, on the same 9th of September, the defendant, by a bill of sale, dated the 18th of August previous, transferred her shares to Bishop. About the beginning of June, W. Robertson, for himself and as the agent of the defendant, entered into a contract with Virtue, for the sale of his own and the defendant's interest in the ship, for 2200*l.* in cash, and a bill for 1000*l.* which was drawn by W.

***337]** Robertson on Virtue, and accepted by *Bishop for the honour of Virtue. This contract was negotiated by Bishop on behalf of Virtue, and there was a verbal understanding between them that Virtue's brother should have the option, when he became of age, of taking the ten shares

The bill of sale from W. Robertson to Virtue, and from the defendant to Bishop, corresponded with the endorsement on the register. The order for the repairs was given by Bishop, who acted as managing owner or ship's husband; and they were all undertaken and performed after W. Robertson had disposed of his own and the defendant's interest in the ship, but before the bills of sale. The repairs were done upon eighteen months' credit: and before that period expired Bishop became a bankrupt. The defendant was not known to the plaintiffs as a part-owner at the time of the repairs, nor had she ever interfered in the matter.

The Lord Chief Justice left it to the jury to say, whether the defendant, at the time the repairs were done, had parted with her beneficial interest in the ship, and whether the bill of sale from the defendant to Bishop was a *bonâ fide* carrying out of the previous contract; and that, if they found in the affirmative on both points, they ought to return a verdict for the defendant. They returned a verdict for the defendant; leave being reserved to the plaintiffs to move to enter a verdict for them, for the amount claimed.

Channell, Serjt., now moved accordingly. Between the months of March and September, during which period the repairs were done, the defendant was a registered owner of the ship. Admitting that the mere fact of the defendant being a registered owner will not make her liable, unless credit was given to her, it was shown that the repairs were necessary, and credit therefore would, *primâ facie*, be given to the owners generally; **Thompson v. Finden*, 4 C. & P. 158. Notwithstanding the con- [•338
tract in June, the legal ownership was not divested from the defend-
ant till the execution of the bill of sale. [TINDAL, C. J. The money was
paid before.] There was nothing to show that the bill of sale was executed
in completion of the original contract. [COLTMAN, J. Was not the result
of the finding of the jury that the bill of sale *was* the completion of the con-
tract?] The defendant was not bound to execute the bill of sale—she did
so voluntarily. Undoubtedly where a charterer orders repairs, he is liable
for them; so in the case of a mortgagee of a ship: but in those cases there is
an express contract; where there is not, the owner is liable for all necessary
repairs. [CRESSWELL, J. Does not the question come back to this,—had
Bishop, who ordered the repairs, any authority, express or implied, to pledge
the defendant's credit, and did he in fact pledge it?] A managing owner
has an implied authority to pledge the credit of his co-owner. In *Dowson*
v. Leake, D. & R. N. P. C. 52, where there were two joint owners of a
ship, and one, by private agreement, parted with all his interest in his share
to the other, to be paid for by bills at different dates, but kept his name on
the register by way of collateral security for the payment of the bills, it
was held that he was liable for repairs done to the ship subsequently to
the agreement, although he had never afterwards interfered in the concerns
or management of the ship. [TINDAL, C. J. Probably, in that case, there
was no conveyance to carry out the contract. CRESSWELL, J. There was
a time when it was thought that the insertion of a party's name in the regis-

ter, as owner, made him liable, in all cases, for repairs; (a) but that doctrine has been repudiated. (b)] **Jennings v. Griffiths*, Ry. & M. 42, *339] is certainly an authority which tends that way. (c) In that case, *Dowson v. Longford* was referred to, which is probably the same case as *Dowson v. Leake*. It must be admitted that if the owner parts with his equitable interest in the ship, and the purchaser of such interest orders repairs, the owner is not liable; but here no credit was given to any one but the owners. [CRESSWELL, J. The order was given by Bishop. But has a managing owner authority to bind an unwilling co-owner?] Not in the case of express dissent. But he would have a general authority as agent. [CRESSWELL, J. How can Bishop be considered as agent for the defendant, when he had accepted a bill for the price of her shares?] It does not appear when the defendant got that bill. [COLTMAN, J. In *Young v. Brander*, 8 East, 10, where the purchaser of a ship, in the interval between the inception and completion of his conveyance, ordered the master to take her to a shipwright to be repaired, which was done accordingly, the seller, although deemed to be the legal owner at the time, was held not to be answerable to the shipwright.] Here, the repairs are ordered by the ship's husband; and he is authorized to order them on the credit of the legal owners; a tradesman in such a case is not estopped from his remedy against the owners, upon the ground that he has given express credit to the party who gave the orders for the repairs.

TINDAL, C. J. I think this falls within that class of cases, in which the legal owner of a ship having parted with his beneficial interest, the question arises whether the party giving an order for repairs had any authority to do *340] so from such owner. In this case there is no *evidence to show that Bishop had any such authority. It appears that William Robertson, the brother of the defendant, was anxious to part with his own shares, and was authorized to part with those of his sister; that he entered into an arrangement, some time in June, with Bishop and Virtue, for the sale, both of her shares and of his own; for which it was agreed he was to receive 3200*l*. It is left a little *in dubio* to whom the shares were to be conveyed. However, Bishop soon afterwards accepts a bill for part of the price of the shares; and shortly after that, a regular bill of sale is executed by the defendant of her shares. It is clear, then, that from the month of June, when the contract of sale was entered into, the defendant had parted with her beneficial interest in the ship, and had no right to any profit accruing therefrom. Consequently she is not liable for these repairs, which were ordered by Bishop after the contract of sale had been made. The case falls precisely within the principle of *Jennings v. Griffiths*; where it was held that the registered owner of a ship is not liable for repairs unless actually done upon his credit; and that although the legal ownership is

(a) See *Westerdell v. Dale*, 7 T. R. 306. See also *Reid v. Coe*, Cowp. 636.

(b) See *McIver v. Humble*, 16 East, 169; *Baker v. Buckle*, 7 J. B. Moore, 349.

(c) See also *Harrington v. Fry*, 1 C. & P. 289.

prima facie evidence of liability, it may be rebutted by proof of the beneficial interest having been parted with, and of the legal owners having ceased to interfere with the management of the ship. I am of opinion that there ought to be no rule.

COLTMAN, J. In *Briggs v. Wilkinson*, 7 B. & C. 30, 9 D. & R. 871, the question appears to be put by BAYLEY, J., in the true light. In that case, Bowman, the managing owner of a ship, mortgaged his share to Wilkinson, who procured the transfer to be duly endorsed on the certificate of registry, but Bowman continued in the management as before, and Wilkinson did not take possession or interfere in the concerns of the ship; and it was held that he was not *liable for repairs and necessities done and supplied in pursuance of Bowman's orders. BAYLEY, J., in his judgment, said: "In the case of a ship, as of other property, an agent may make himself, or his principal, liable for repairs. But the question here is, whether Wilkinson can, or cannot, be treated as one of Bowman's principals? Where a ship is under the management of the master, and the owners divide the profits, the master is *prima facie* agent for them all; but the mere legal ownership does not make any person liable for the ship's debts." And, after referring to several cases that had been cited, his lordship added—"Inasmuch, then, as Wilkinson had merely the legal ownership as mortgagee, and Bowman had not any authority, either express or implied, to pledge his credit, I think the nonsuit in this case was right." 7 B. & C. 35, 36. In the present case Bishop, as managing owner, would have an implied authority to bind those who had a beneficial interest in the ship, in the absence of any dissent on their part. But the defendant had, with the knowledge of Bishop, parted with her beneficial interest. He therefore had no authority to pledge her credit. [*341]

ERSKINE, J. I also am of opinion that there should be no rule in this case. The plaintiff is bound to show, first, that Bishop had authority to pledge the defendant's credit, and, secondly, that he did so. Being the ship's managing owner, he would have an implied authority from his co-owners to order necessary repairs. But, before the repairs were ordered, the defendant had contracted to sell her interest; and that contract was afterwards perfected. Bishop was well aware of all this. How then, under these circumstances, can it be said that he had any implied authority from the defendant to order these repairs. Where an owner has entered into *merely a *private* arrangement for the sale of his interest, he would not be allowed to set up such arrangement to defeat the claim of a party who had done repairs, being aware that he was owner. But that is not the present case. [*342]

CRESSWELL, J. I am of the same opinion. Bishop had no authority, express or implied, to pledge the credit of the defendant; nor does it appear that she ever allowed herself to be held out to the plaintiffs as a part owner. And though her name was on the register, as one of Bishop's co-

stituents, at the time the repairs were ordered, the fact does not even appear to have been known to the plaintiffs.

Rule refused.

GOSLIN v. CORRY. *April 19.*

In an action for a libel in the form of an advertisement, charging the plaintiff with fraud, and offering a reward for his apprehension, evidence having been given, with the consent of the defendant's counsel, of arrests of the plaintiff in consequence of the advertisement, *after the commencement of the action*, it was held, that the defendant could not afterwards complain that the judge, in his summing up, did not expressly tell the jury that they were not to take those arrests into their consideration in estimating the damages for the libel.

CASE, for the following libel published in the Hue and Cry Police Gazette:—"Absconded from Fleetwood, Lancashire, James Goslin, charged with fraud. He is about five feet ten inches high: of bony make: has a singular countenance; very long white face, thickly marked with small-pox: has a cast in his eyes, and has rough gray hair; was formerly a bricklayer in the employ of Mr. Jackson, builder, Pimlico, and is supposed to be in the neighbourhood of his works. Information to be given at the police-office, or to Mr. *Noble, attorney, Preston, by whom a reward of *343] 2*l.*, and all reasonable expenses, will be paid on his apprehension. Bow Street, March 29th, 1843." After setting out the libel and alleging general damage, the declaration proceeded to state special damage as follows; and also, by reason thereof, a certain police-constable, to wit, one William Flaxman, having notice of the publication of the said libel, and believing the same to be true, after the time of the committing the said grievances, to wit, on the 18th of April, in the year aforesaid, and in order to obtain the reward offered by the said libel, apprehended the plaintiff, and imprisoned him for a long time, to wit, three hours then next following, in order that the plaintiff might be dealt with according to law upon the charge against the plaintiff contained in the said libel; and thereby the plaintiff was exposed to public scandal, shame, and disgrace; and the plaintiff had been and was, by means of the premises, otherwise greatly injured and damnified, &c.

The defendant pleaded, not guilty.

At the trial of the cause before TINDAL, C. J., at the sittings at Westminster after the last term, it appeared that the libel was transmitted to Mr. Burnaby, the editor of the Police Gazette, enclosed in a letter signed by the defendant, with a request to insert it in the next Gazette. The letter, which was received by Mr. Burnaby on the 29th of March, 1843, was dated from Preston on the preceding day. The action was commenced on the 19th of April following.

The libel was published twice in the Hue and Cry, on the 31st of March, and the 5th of April. On the 25th of April, 1843, the plaintiff was apprehended by a police-serjeant named Flaxman, and carried to a police-station where he was locked up, and afterwards taken to the Mary-le-bone police-office. The following entry was made in the charge-sheet:—"Hour

brought to station, *10 A. M. Age, 33. James Goslin, on suspicion of being the party described in Police Hue and Cry of 31 March, 1843, for committing a fraud. Taken before Mr. Rawlinson, who, after hearing police-serjeant, sent Goslin in custody to Mr. Burnaby at Bow Street, to know if any charge against Goslin. Mr. Burnaby said not; and he was then discharged a little after twelve at noon." In consequence of the notice in the Police Gazette, the plaintiff was arrested a second time on the 13th of May, at Hook in Surrey, and was compelled to give bail in order to obtain his release. [*344]

These two arrests were given in evidence *with the consent of the defendant's counsel*.

The Lord Chief Justice, in leaving the case to the jury, told them, that the two arrests, being subsequent to the commencement of the action, were not, in strictness, evidence in the cause, but that the tendency of the advertisement was to cause the plaintiff to be arrested upon the charge of fraud therein made, and that the evidence of such arrests was received with the consent of the defendant's counsel: his lordship directed them to take all the circumstances into their consideration, and, if they were satisfied that the defendant was the author of the publication, to give the plaintiff such temperate and reasonable damages as in their judgment he was entitled to upon the facts proved.

The jury having returned a verdict for the plaintiff, damages 50*l.*,

Shee, Serjt., now moved for a new trial, on the ground of misdirection. He submitted, that, although the defendant's counsel had consented to evidence being given of special damage accruing to the plaintiff subsequently to the commencement of the action, the Lord Chief Justice ought to have cautioned the jury that they were not to take such special damage into consideration *in estimating the damages, inasmuch as the plaintiff was not debarred, if he thought proper, from bringing a second action for the false imprisonment. The learned serjeant referred to the note to *Hamilton v. Veere*, 2 Wms. Saund. 171 b. [*345]

TINDAL, C. J. I incline to think, that whenever counsel allow evidence to be given that is not strictly and properly admissible, they must submit to all the consequences which result; at any rate, unless they caution the judge, in summing up, to deprive such evidence of its effect. If this were not so, a defendant might gain a great advantage without incurring any risk. In the present case, the defendant's counsel attempted, although unsuccessfully, to show, by the cross-examination of the policeman, that the plaintiff was instrumental to his own arrest. By permitting this evidence to be given, the defendant may possibly have escaped having a second action brought against him. It was, therefore, far from an impolitic thing to allow damages to be assessed for the whole cause of complaint in one action. Under the circumstances, I do not see how it was possible for me, in summing up the case, to exclude from the consideration of the jury any part of the evidence that had been received. In my opinion there ought not to be a new trial.

COLTMAN, J. The defendant's counsel took a course that was quite open to him. I see nothing in the summing up, as it is represented to us, to show that the Lord Chief Justice left it to the jury to ascertain the amount of damages suffered by the plaintiff by reason of the two arrests. He certainly appears to have adverted to that fact: but he could not exclude it from the consideration of the jury. What I understand his lordship to have *346] told the jury is this, that, in dealing with the libel, they might take into their consideration the subsequent arrests as that which was very *likely* to follow from such a publication. And I do not think the jury have given an exaggerated amount of damages for such a libel, unjustified.

ERSKINE, J. I am of the same opinion. It was open to the defendant's counsel to take one of two courses, either to agree that the jury should give damages for the whole injury, whether sustained before or after the bringing of the action—or to insist that all which occurred subsequently to the commencement of the action should be excluded from the consideration of the jury. The defendant's counsel thought proper to adopt the former course. It appears to me that, if the Lord Chief Justice had told the jury they were at liberty to give damages for the arrests, that would have been a misdirection. But there does not seem to have been any such misdirection in the case. On the contrary, the jury were cautioned that the plaintiff was not entitled to damages in respect of such subsequent arrests: but that, inasmuch as the evidence had been admitted with the consent of the defendant's counsel, it could not be altogether excluded. Taken in connection with the rest of the summing up, that amounts to no more than this, that the jury were to give the plaintiff such measure of damages as they thought him entitled to for the publication of the libel, and for the mental suffering arising from the apprehension of the consequences of the publication; (a) merely treating the fact of his having been afterwards arrested as showing that such apprehension was just.

*347] *CRESSWELL, J. I also am of opinion that there was no misdirection in this case. If counsel think proper to permit evidence to be given that is not strictly admissible, they cannot afterwards require it to be withdrawn. In submitting it to the jury, however, the judge may moderate the effect of such evidence; as he may that of any other. It does not appear in this case that the Lord Chief Justice told the jury that the special damage alleged in the declaration was proved—such special damage being the arrest of the plaintiff *before* the commencement of the action. All that he said to them with respect to the arrests which took place after action brought, was that they might be viewed as a confirmation of the justice of the plaintiff's apprehension of an arrest being the probable consequence of the publication of the libel. In this it seems to me his lordship was quite right. Rule refused.

(a) Taking also into their consideration the probability that the libel might be attended with such results, though they could not act upon the *certainly* evidenced by the actual arrests.

DOE dem. JAKES v. ROE. *April 20.*

The court refused a rule for judgment against the casual ejector, upon a notice requiring the tenant in a country ejectment, to appear "on the first day of the term."

DOWLING, Serjt., moved for judgment against the casual ejector. The cause was a country cause; but the notice at the foot of the declaration, instead of requiring the party to whom it was addressed to appear in this court in Easter term next, required him to appear "on the first day of next Easter term."

Per curiam. The notice you have given is clearly an improper one.

Rule refused.

*HUDSON v. FAWCETT. *April 22.*

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To a declaration in debt on a promissory note for 40*l.*, payable on demand, "with lawful interest for the same," (without alleging that any interest was due,) with counts for money lent and money due on an account stated, the defendant pleaded "as to the said debts in the declaration mentioned, except as to 5*l.*" (which he paid into court,) payments to a larger amount, which the plaintiff accepted "in full satisfaction and discharge of the said debts, except as aforesaid, and of all damages by the plaintiff sustained by reason of the detention."

The replication traversed the acceptance in satisfaction:

Held, that the interest was part of the debt, and also that it was recoverable, as such, upon the pleadings.

DEBT, by the payee, against the maker, of a promissory note for 40*l.*, dated the 29th of March, 1840, and payable on demand, "with lawful interest for the same." Breach, that, "by reason of the non-payment of the said sum of 40*l.* in the said note specified, being parcel of the sum demanded [140*l.*], an action had accrued to the plaintiff to demand and have the same of and from the defendant." The declaration also contained counts alleging that the defendant was indebted to the plaintiff in 50*l.* for money lent, and in 50*l.* for money found due from the defendant to the plaintiff upon an account stated.

The defendant pleaded, first, *as to the said debts* in the declaration mentioned, except so far as the same relate to the sum of 5*l.*, parcel of the sum of money in the first count of the declaration mentioned, that, on divers days after the accruing of the said debts and before the commencement of this suit, he the defendant paid to the plaintiff, and the plaintiff then accepted and received of and from the defendant, divers sums of money, amounting, to wit, to the sum of 150*l.* in full satisfaction and discharge of the said debts, except as aforesaid, and of all damages by the plaintiff sustained by reason of the detention of the said debts, except as aforesaid—verification; secondly, a set-off of 150*l.* for money lent, money paid, and money due on an account stated; thirdly, payment of 5*l.* into court.

The plaintiff, by his replication, traversed the first two pleas, and took the 5*l.* out of court.

*At the trial before WIGHTMAN, J., at the last summer assizes at York, a verdict was found for the defendant, leave being reserved

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to move to enter a verdict for the plaintiff, if *interest* was recoverable upon the pleadings as they stood.

Sir *T. Wilde*, Serjt., in Michaelmas term last, obtained a rule nisi to enter a verdict for the plaintiff, with 4*l.* 10*s.* *damages*, or for such other sum as the court should direct.

Byles, Serjt., now showed cause. The first plea is pleaded, not to the whole cause of action except as to 5*l.*, but to the *debts* only. [TINDAL, C. J. The commencement of the plea is an answer only to the *debts* mentioned in the declaration; but it afterwards alleges, that the payments were accepted and received "in full satisfaction and discharge of the said debts, except as aforesaid, and of all *damages* by the plaintiff sustained by reason of the detention of the said debts, except as aforesaid."] The plea is an answer as to so much of the declaration only as it professes to answer in the commencement; *Gray v. Pindar*, 2 B. & P. 427; *Henry v. Earl*, 8 M. & W. 228, 9 Dowl. P. C. 725. The plaintiff might probably have demurred, or he might have signed judgment by *nil dicit* in respect of the part left unanswered: but the defect is cured after verdict. [TINDAL, C. J., referred to 1 Wms. Saund. 28, n. (3,) where it is said: "If a plea begin with an answer to the *whole declaration*, but, in truth, the matter pleaded is only an answer to *part*, the whole plea is bad, and the plaintiff may demur. But, if a plea begin only as an answer to *part*, and is in truth but an answer to *part*, or though in law it is an answer to the whole, it is a discontinuance, and the plaintiff must not demur, but take his judgment for that as by *nil dicit*; for, *350] if he *demurs or pleads over, the whole action is discontinued."

COLTMAN, J. Is not the interest here a *debt*? In *Watkins v. Morgan*, 6 C. & P. 661, A. covenanted to pay B. 270*l.* on the 15th of December, *with interest up to that time*. Not having done so, B. brought an action of debt, laying his damages at 10*l.*: and it was held that B. could not recover any more than the principal, *the interest up to the 15th of December*, and 10*l.* more, although the interest up to the time of the action amounted to a larger sum; and the judge at the trial refused to allow the declaration to be amended by inserting therein a larger sum than 10*l.* as the damages. Can you distinguish that case from the present?] It must be admitted that is difficult to do so.

TINDAL, C. J. If the interest forms part of the debt, as I think it clearly does, *Watkins v. Morgan* is a conclusive authority in the plaintiff's favour. On the other hand, if it does not, it appears to me to be too late to take this objection on a motion for a new trial, after the parties have gone down to trial upon an issue, whether the plaintiff accepted and received the money in the plea mentioned in full satisfaction and discharge of the debts, except, &c., and of *all damages* sustained by reason of the detention of such debts.

The rest of the court concurred.

Rule absolute to enter a verdict for the plaintiff, with 2*s.* 6*d.* *damages*. (a)

(a) The plaintiff declared for the principal only, demanding 40*l.*, the amount of the note, without interest. *Quære*, whether the interest, not being declared for, was recoverable as *debt*, and whether, being part of the debt, it could be recovered, as *damages*. *Et vide Dickinson v. Harrison*, 4 Price, 282, ante, Vol. I. 306, 316, 320, 323; 1 Wms. Saund. 201, n. (1).

*ROBSON v. JONASSOHN and FLETCHER. April 22. [*351

The messenger to a fiat in bankruptcy appointed by the commissioners under the 6 G. 4, c. 16, s. 27, may be removed by the assignees.

DEBT, for work and labour, done for the defendants by the plaintiff, (as messenger to a fiat in bankruptcy awarded against one Proud, under which the defendants had been appointed assignees;) and for money paid by the plaintiff to the use of the defendants.

Plea, never indebted.

At the trial before CRESSWELL, J., at the last summer assizes for the county of Durham, the following facts appeared in evidence.

The fiat against Proud issued on the 24th of December, 1840. The plaintiff was duly appointed messenger, by the commissioners, upon the opening of the fiat, on the 21st of January, 1841. The warrant of seizure (a) contained the following usual clause, "and what you shall so seize, you shall keep in your possession till we give you orders for the disposal thereof." (b) The plaintiff put one Redfern into possession. The defendants were chosen assignees on the 12th of February, when they gave the plaintiff notice that they should no longer require his services as messenger, and appointed one Crowe in his place, who asked Redfern to continue in possession for him. After this the plaintiff, at the request of the solicitor to the fiat, served certain summonses, and attended two meetings. On the 14th of April, the bankrupt's effects were sold by the defendants.

The plaintiff afterwards sent in a claim, consisting of three separate classes of charges; one, for keeping possession down to the choice of the plaintiffs, as assignees; a second, for keeping possession to the time of the sale, amounting to 15*l.* 10*s.*; and a third, for the service *of the [352 summonses and attendance at the meeting, amounting to 2*l.* 13*s.* 4*d.*

In October, the commissioners made an order for the payment of the whole of the plaintiff's charges; but it appeared that their attention was not called at the time to the circumstances of the case. The defendants paid the first item of the demand, but resisted the last two; the amount of which, the present action was brought to recover.

Under his lordship's direction the jury found a verdict for the plaintiff for 2*l.* 13*s.* 4*d.*, the amount of the last charge, leave being reserved to the plaintiff to move to increase the damages by the sum of 15*l.* 10*s.*, and to the defendants to move to set aside the verdict and enter a verdict for themselves.

In last Michaelmas term cross rules were obtained accordingly by *Byles*, Serjt., for the plaintiff, and *Talfourd*, Serjt., for the defendants.

Talfourd, Serjt., now showed cause against the rule to increase the

(a) See 6 G. 4, c. 16, s. 27.

(b) See the form of the warrant, *Mont. & Ayr. B. L. App.* pp. 33, 34, 2 *Cooke, B. L.* 19.

damages. (a) The question is whether a messenger to a fiat has such a vested interest in his appointment, that the assignees cannot remove him. *Hamber v. Purser*, 2 C. & M. 209, 4 Tyrwh. 41, will be relied upon on the other side. That was a similar action to the present; and it was held that it is not necessary for the plaintiff to prove an employment by the assignee, or any express recognition as messenger, as the facts of his having acted as messenger, and of the expenses incurred, must have been known to the assignee. In that case, however, the assignee *suffered* the messenger to go on acting in that capacity. Here, the assignees actually removed the *353] messenger; which they clearly had a right to do; the *whole power over the bankrupt's estate being vested in them.

Byles, Serjt., in support of his rule. The original appointment and warrant by the commissioners continue in force. The plaintiff was bound, under that warrant, to keep possession of the bankrupt's property till he received orders for its disposal from the commissioners. [TINDAL, C. J. He could not prevent the assignees from selling.] If any difficulty had arisen there might have been an application to the commissioners. The sum now in dispute has been allowed by them. [CRESSWELL, J. Their attention was not called to the matter. TINDAL, C. J. It would be singular if the assignees could not appoint a person to keep the property which the law vests in them.] The effect of the warrant was discussed in *Page, ex parte*, 1 Rose, 2, 17 Ves. 59. (b) In *Sly v. Stevenson*, 2 C. & P. 464, it was decided that a warrant to search for the goods of a bankrupt in the house of a third person, is not valid if granted to any one except the messenger under the commissioner. (c) [CRESSWELL, J. By the thirty-first section of the 6 G. 4, c. 16, (d) the messenger appears to be only protected for acts done before the choice of assignees.] If the court upholds the right of assignees to remove the messenger, they will have to import into the warrant the words—"or until the choice of assignees." [TINDAL, C. J. So, in any *354] general appointment, it might be said *that the words "until death" should be imported. We give effect to the result of the law.]

Per curiam;

Rule discharged.

(a) The learned serjeant admitted that there was evidence of an employment of the plaintiff by the solicitor to the fiat, sufficient to sustain the verdict for 2l. 13s. 4d.

(b) And see 1 Christ. B. L. 195.

(c) This was not the case of a warrant to seize under the twenty-seventh section of the statute 6 G. 4, c. 16, but of a magistrate's search-warrant, issued under the twenty-ninth section, which expressly authorizes a justice of the peace to grant such a warrant "to the person so deputed by the commissioners as aforesaid."

(d) "No action shall be brought against any person so appointed by the commissioners, for any thing done in obedience to their warrant, prior to the choice of assignees, &c., without making the petitioning creditor defendant."

SHARPE v. HANCOCK. *April 22.*

A drain was made in pursuance of an award by the commissioners under an enclosure act, passing along Blackacre, and over and across Whiteacre; by which award it was ordered, that the owners of the lands over which the drain passed should cleanse and keep the same of a sufficient width and depth to carry off the water intended to run down the same. The occupier of Blackacre afterwards opened a sough or underdrain into the awarded drain:—*Held*, that this method of draining not being contemplated by the award, the owner of Whiteacre was not required to keep the awarded drain of sufficient capacity to carry off the water from the sough.

CASE, for omitting to cleanse a drain or watercourse; whereby the plaintiff's lands were flooded.

The declaration, which was in the ordinary form,^(a) contained two counts; the first, for suffering the drain to be choked up with mud, &c.; the second, for putting soil, &c., into the drain. Each count contained the usual allegation that the water and moisture of, in, and upon the close of the plaintiff were used and accustomed to run, flow, and pass away, and did run, &c., and of right ought to have run, &c., and still of right ought to have run, &c., out of and from the said close of the plaintiff unto, into, through, over and along the said close of the defendant, &c.

The defendant pleaded, first, (to the whole declaration,) not guilty; secondly and thirdly, to the first and second counts respectively, pleas traversing the above allegations as to the plaintiff's right.

On all these pleas issue was joined.

At the trial before PATTESON, J., at the last summer assizes for Nottinghamshire, the following facts appeared in evidence.

*The plaintiff was the occupier of an ancient close, called the Moor Close, in the township of Lyeceston, in the county of Nottingham; and the defendant was the occupier of an adjoining close, lying lower down, which had been formerly allotted to one William Brown, under an award made by commissioners pursuant to an enclosure act, 32 G. 3, c. xlix. [*355]

By sect. 7 of that act, the commissioners were empowered to set out and appoint certain public bridle-roads, &c., ditches, drains, watercourses, &c., in, over, and upon the lands and grounds thereby intended to be divided and enclosed, and also in, over, and through the ancient enclosures within the said township.

By an award made in the year 1795, in pursuance of this act, the commissioners set out and appointed a drain or watercourse, which, after passing through other lands, was to pass along the east side of the Moor Close, and over and across the allotment therein made to William Brown.

The award contained the following clause:—

“And we do order and direct that the owners, or occupiers, of the lands over which such drains respectively pass, do make, and for ever hereafter cleanse and keep, the same of sufficient width and depth to carry off the water *intended to run down the same.*”

(a) See 2 Chitt. Pl. 6th edit. 562, 1 Q. B. 766.

The drain was made in pursuance of the award; and in the year 1808, the then occupier of the plaintiff's close cut a sough, or under-drain, across a portion of that close, which sough opened into the awarded drain. There was much contradictory evidence as to the precise point at which the sough opened into the awarded drain, and also as to the effect produced by such opening; the witnesses for the plaintiff stating, that eighteen or twenty years ago the water flowed freely from the sough into and along the awarded drain; those for the defendant asserting, that, in consequence of *356] the sough having been originally constructed in an improper manner, the water never did flow from it.

At the close of the plaintiff's case, a nonsuit was applied for on the part of the defendant, upon the ground that no such user had been made out as would give the plaintiff a title under the last prescription act, 3 & 4 W. 4, c. 71. The plaintiff, however, disclaimed putting his case upon user, but insisted that he had acquired a title to make the sough under the award.

The learned judge refused to stop the case: and after the defendant's evidence had been gone through, his lordship, in summing up, told the jury that the question for their consideration was, whether the plaintiff's land was ever drained by the drain which ran through the defendant's close; that if they were of opinion that the plaintiff's land had been drained, either by means of the awarded drain or of the sough, for twenty years before the defendant obstructed it, the plaintiff was entitled to a verdict; but his lordship reserved leave to the defendant to move to enter a nonsuit.

The jury returned a verdict for the plaintiff, with 5*l.* damages.

Sir T. Wilde, Serjt., in last Michaelmas term, (7th of November,) obtained a rule *nisi* for a nonsuit, pursuant to the leave reserved, or for a new trial, on the ground that the verdict was against the evidence.

Talfourd and Byles, Serjts., (with whom was Whitehurst,) now showed cause. Under the award, the plaintiff had a right to have the water carried off his land, whether such water flowed from the sough or from the awarded drain. The question in the case really is, what water was intended by the *357] award to run down the drain. If the plaintiff was not at liberty to make the sough, for the better draining of his land, it might be said he had no right to make furrows in his land, which would act as surface drains. [CRESSWELL, J. You may try the question by supposing there was no awarded drain. Would the plaintiff have a right to under-drain upon the defendant's land?] If there had been an ancient ditch there, the plaintiff would have had a right to use it to drain his land. The defendant has a *servitude* imposed in respect of the drain, and is bound to keep it open.(a) Even supposing the award to be equivocal in its terms,

* (a) The learned counsel referred to Gale & Whatley on Easements, (p. 181,) where it is said that, "with regard to watercourses altogether artificial, there seems no reason to doubt that the long-continued submission of the servient owner to the discharge of water upon his tenement, or to the conducting of it through his land by the owner of the dominant tenement, will confer the right to continue the discharge of the water, or to receive the supply of it." Vide 11 A. & E. 571.

the court will not impose a limit to the quantity of water which ought to flow along the drain.

Sir *T. Wilde* and *Channell*, Serjts., (with whom was *Waddington*), in support of the rule. Where a party has a right to a watercourse, he cannot so alter it as to increase the liabilities of others. The plaintiff has a right, under the award, to the carrying off of all the water that would have flowed through the awarded drain; but it is clear the commissioners did not contemplate any system of under-draining. [COLTMAN, J. You would say that the plaintiff could not make a grip from any part of his close into the awarded drain.] He could not, so as to alter the defendant's liability. There is no complaint that the portion of the awarded drain which runs across the defendant's close, is of insufficient capacity *to carry off [*358 all the water that would naturally run down the awarded drain independently of the sough. The real grievance is the obstruction of the sough.

TINDAL, C. J. Upon the evidence reported to us, it appears to me that the plaintiff has failed to make out his case. The right which he claims by his declaration, and which is denied by the pleas, is sought to be supported under the award made by the commissioners under the enclosure act. The plaintiff shows no title by usage, so as to bring himself within the operation of the late prescription act. The question for our determination therefore is, whether the right which he claims is given him by that award. (His Lordship read the terms of the act and award, *ut supra*.)

It appears, therefore, that the award casts the liability to cleanse the drains, upon those parties through whose lands the drains were to pass. It does not very clearly appear, whether that part of the awarded drain into which the plaintiff's sough opens, is in his own soil. If it is, the evil of which he complains is of his own creation. But if it be in the defendant's soil, the point for our consideration is, whether the defendant has been guilty of any breach of duty in omitting to do something which by the award he is required to do. Now all that the award requires him to do, is to make, and cleanse, and keep, a drain of sufficient width and depth to carry off the water intended to run down the same. This award is not to be construed as though it had been made within a few days of the present time. It appears that all that the commissioners intended was that the drain should be sufficient to carry off all such water as was injurious to the lands at the time the award was made. The sough was made by the plaintiff, several years afterwards, for the purpose of more effectually draining *his land. I cannot think that the commissioners contemplated the [*359 making of such an under-drain; so as to vary and increase the liabilities of the occupiers of other lands through which the awarded drain was to run, and render it necessary to widen or deepen that drain. It seems to me, therefore, that in either view of the case, the plaintiff has no right of action, and that the rule for entering a nonsuit must be made absolute

COLTMAN, J. I am of the same opinion. The award is certainly most

lamentably vague in its terms, not explaining what water was intended to run down the awarded drain. But it seems to me that the only right the plaintiff can claim under the award, is, to have a drain of sufficient capacity to carry off all the water which would, in the ordinary course of husbandry, have flowed into it at the time the award was made. The sough or under-drain was not in existence at the time the award was made; and, at the trial, the plaintiff appears to have addressed his evidence exclusively to the incapacity of the awarded drain to discharge the water from that sough. It seems to me that, in so doing, he totally mistook the extent of his rights and of the liability of the defendant.

ERSKINE, J. The complaint of the plaintiff is, that the defendant, by obstructing that part of the awarded drain which passes through his close, has prevented the water from flowing off the plaintiff's land as it ought to have flowed under the award. If any injury of the kind has happened, it appears to me to be traceable to the fact of the award having left the state of this particular close unprovided for. It is not conclusively shown by the evidence, that the awarded drain was originally cut deeper than the *360] under-drain; on the contrary, that appears to have been lower than the awarded drain. I agree that the plaintiff has not shown any injury sustained by him, to be the consequence of any misconduct on the part of the defendant.

CRESSWELL, J., concurred.

Rule absolute, to enter a nonsuit.

LACKINGTON and Another, Assignees of PETER PAUL the elder and PETER PAUL the younger, Bankrupts, v. ATHERTON. *April 23.*

Certain timber, which was deposited in the name of A., the importer, in the West India Docks, was sold by him to B. B. afterwards contracted to sell the timber to C., who accepted a bill for the amount, B. giving him an invoice of the timber, and a delivery-order. The dock company refused to deliver the timber except upon an order from A. C. became bankrupt without having obtained such an order; and the bill was dishonoured.

Held, that there had been no constructive delivery to C., so as to put an end to B.'s lien on the timber for the price.

Held, also, that B. was not estopped, by having given a delivery-order, from disputing the operation of such order as a constructive delivery of the timber.

TROVER, to recover the value of certain deals.

Pleas; first, not guilty; secondly, that the plaintiffs were not possessed as assignees.

At the trial before CRESSWELL, J., at the sittings for Westminster, after last Michaelmas term, the following facts appeared in evidence. The deals were imported by one Tindal from Quebec, and deposited, and entered in his name, in the docks of the West India Dock Company. He afterwards sold them to the defendant and one Congreve, (since deceased,) who were timber-merchants in Northamptonshire. In the month of September, 1839, the defendant and Congreve contracted to sell the deals, for 250*l.* 13*s.* 4*d.*,

to the bankrupts, who were timber-merchants in London, *to be paid for by a bill at seven months. A bill for the amount was accepted by the bankrupts, on the 27th of September; and on the same day, an invoice of the deals was delivered to them, and a delivery-order, signed by the defendant, was addressed to the dock company, on the 12th of October. This order was presented by the bankrupts to the superintendent of the docks, who stated that it could not be executed, and that, according to the practice of the dock company, a delivery-order from Tindal was required. The bankrupts did not obtain any further order; and on the 30th of October a fiat issued against them, under which the plaintiffs were chosen assignees. On the 11th of November, the defendant having obtained a delivery-order from Tindal, bearing date prior to the sale to the bankrupts, removed the deals from the West India Docks. The bill given by the bankrupts was dishonored, and remained unpaid. [*361]

The learned judge was of opinion, as contended on the part of the defendant, that there had been no constructive delivery of the deals to the bankrupts, and that as they were unpaid for, the defendant was entitled to stop them; and he directed a nonsuit, reserving leave to the plaintiffs to move to enter a verdict for the amount claimed.

Channell, Serjt., in last term, obtained a rule nisi, accordingly.

Byles, Serjt., now showed cause. The defendant had not parted with his possession of the deals, and his lien therefore remained. The delivery-order given by him and Congreve cannot be considered as a constructive delivery. That order was of no avail, the only person who could give a valid order being Tindal, in whose name the goods continued to stand; and if the *defendant had become bankrupt, Tindal might, as against him, have stopped the deals, since it does not appear that he has paid for them. *Dixon v. Yates*, 5 B. & Ad. 313, 2 Nev. & Mann. 177, (and see *antè*, Vol. II. 805, Vol. IV. 1082,) and *Townley v. Crump*, 4 A. & E. 58, 5 Nev. & M. 606, are precisely in point. [*362]

Channell, Serjt., in support of the rule. If Tindal's order was necessary to give validity to the transfer from the defendant to the bankrupts, still the defendant, having assumed a right to transfer, is estopped from setting up his want of that right, arising from his omission to procure a proper delivery-order. But there is no reason to assume that Tindal was an unpaid vendor; and supposing the defendant and Congreve to have paid him at the time of their purchase, they would have the property in the deals, and the right of possession, at the time they gave the delivery-order to the bankrupts; and then such order would operate as a constructive delivery. The assent of the wharfinger has, in some cases, been considered as requisite to give validity to such a transfer. Such an assent existed in *Harman v. Anderson*, 2 Campb. 243, where the wharfinger, upon receipt of a delivery-note, had transferred the goods in his books into the name of the purchaser; but Lord ELLENBOROUGH afterwards said, with the concurrence of the rest of the court,—“After the note was delivered to the wharfingers, they were

bound to hold the goods on account of the purchaser. The delivery-note was sufficient, without any actual transfer being made in the books. From thenceforth they became the agents of Dudley, the bankrupt (the purchaser). They themselves might have a lien upon the goods, and be justified in detaining them till that was satisfied: but, as between vendor and vendee, *363] the delivery was complete, and the right to stop in **transitu* was gone." The principle of that case is recognised in *Withers v. Lyss*, 4 Campb. 237, Holt, 18, and *Lucas v. Dorrien*, 7 Taunt. 278, 1 J. B. Moore, 29. In *Dixon v. Yates* and *Townley v. Crump* there had been no delivery-order by the vendor, and the goods remained in the warehouse of the vendor himself.

TINDAL, C. J. This is an action by the assignees of bankrupts in respect of goods for which the bankrupts had never paid; and the question is, whether the defendant stopped the goods before there was any delivery to the vendees. And it appears to me, from the facts of the case, that the stoppage did take place before there was any delivery. Where goods have not been paid for, there must be either an actual or constructive delivery to the vendee, in order to put an end to the vendor's right of stoppage. In this case there clearly was no actual delivery. The question is, was there a constructive delivery. The timber was deposited by Tindal with the dock company, and was entered in their books in his name. The defendant and Congreve, who had purchased from Tindal, sold to the bankrupts, and gave them a delivery-order. If that order had been in the name of Tindal, all would have been right; there would have been a constructive delivery to the bankrupts, and the property would now have vested in their assignees. But the delivery-order was in the name of persons who were strangers to the company—namely, the defendant and Congreve, to whom there had been a sale by Tindal. The question is, whether that order was a document which the company were bound to obey. The company were neither the servants nor the agents of the defendants and Congreve: they were the agents of Tindal; and the order in question was, in effect, no *364] order at all upon them. It seems to me, on this short ground, *that there was no constructive delivery to the bankrupts. I cannot distinguish this case, in principle, from *Dixon v. Yates*, though the facts there were somewhat different. It has been contended here, that the distinguishing fact between the two cases is, the giving of the delivery-order by the defendant and Congreve, and that the defendant ought thereby to be estopped from saying that he was not in a situation to give a valid order. And if the situation of the bankrupts had been, in any manner, altered by the delivery of the one order instead of the other, there might have been something in the objection; but the bankrupts never paid for the goods. Their assignees are standing upon a strict point of law; and I think it is against them, and that the nonsuit was right.

COLTMAN, J. *Harman v. Anderson* is the only authority upon which the plaintiffs can really rely. In *Withers v. Lyss*, although it recognises the

former case, the point was entirely different. In *Lucas v. Dorrien* the question was, not as to any right of stoppage *in transitu*, but whether the property had passed. It is not material, therefore, upon this question. *Harman v. Anderson* certainly shows that the delivery of an order to a wharfinger will put an end to the right of the vendor to stop *in transitu*. But there, the wharfinger was bound to obey the order; which is not the case here; for the dock company were not bound to obey the order of the defendant and Congreve. There was no actual delivery to Paul and Co.; and the dock company not being agents of the defendant, the order from him and Congreve was no constructive delivery to Paul and Co. The only ground upon which the plaintiffs can rest their case is, that giving the delivery order by the defendant and Congreve acts as a sort of estoppel to the defendant, and that it is not competent to him afterwards, *to deny its validity. If the situation of the parties had been altered in consequence, possibly that might have been so. But no such alteration took place. [*365

ERSKINE, J. I also am of opinion that the nonsuit in this case ought not to be disturbed. The goods were originally in the warehouse of the dock company in the name of Tindal, who sold them to the defendant and Congreve. It does not appear whether they had been paid for by the latter before the bankruptcy of Paul and Co., or whether the delivery-order given by Tindal to the defendant and Congreve had been so given before that time. At the time of the sale to the bankrupts, the property was in the defendant and Congreve, and by that sale the property was transferred to the bankrupts; but the question is, whether the possession also passed. All that was done was, the handing over of the delivery-order by the defendant and Congreve to the bankrupts. If, at that time, the defendant and Congreve had had complete dominion over the goods, the delivery of that order would, according to *Harman v. Anderson*, have operated as a constructive delivery of the goods to the bankrupts. But the dock company held the goods as the agents, not of the defendant and Congreve, but of Tindal; and therefore the delivery-order, given to the bankrupts, did not create the relation of principal and agent between the bankrupts and the dock company. It appears to me, that the only ground for any argument in the case is, that raised upon the question of estoppel; but that has been fully answered by my lord and my brother COLTMAN, in saying that the rights of the parties have been in no way altered. If there had been a sale by the bankrupts, possibly the order might have been set up as an estoppel.

CRESSWELL, J., concurred.

Rule discharged.

*366] *TODD v. The LONDON and SOUTH WESTERN Railway Company. *April 24.*

By a paving act commissioners were authorized to impose a rate, for paving, repairing, &c. the streets, squares, &c. within the city of W., and certain suburban parishes, upon the occupiers of houses, buildings, lands, &c., "except all arable, meadow, and pasture land without the walls of the city, and also except all that messuage, &c., together with the barns, stables, &c., and grounds thereunto belonging, situate, &c., and now in the tenure or possession of S. T., called or known by the name of B. Farm." A part of the grounds so exempted were afterwards occupied by a railway company, for the purposes of their railway.
Held, that such part was still exempt from the rate.

THIS was an action of debt, brought by the plaintiff as clerk to the commissioners hereinafter mentioned; and the declaration stated the defendants to be indebted to him, as such clerk, in the sum of 19*l.* 1*s.* 8*d.*

The defendants pleaded never indebted; and thereupon issue was joined.

The following case was stated for the opinion of the court, under a judge's order:—

By an act passed in the eleventh year of George III. (11 G. 3, c. 9,) "for the better paving, repairing, cleansing, lighting, and watching the streets and other public passages within the city of Winchester, and also within the several parishes of St. Bartholomew, Hyde, &c., in the suburbs of the said city, and for preventing nuisances and annoyances therein, and for widening and rendering the same more commodious," certain persons, therein named, were appointed commissioners for putting the said act in execution.

The statute contains provisions for the appointment of new commissioners from time to time; and commissioners for executing the same, together with the act hereinafter mentioned, have been at all times, and still are, duly appointed. The plaintiff is clerk to such commissioners.

The statute, after vesting the pavements of the several streets, and other
*367] public passages, within the said city and suburbs, in the commissioners, and providing for the paving, watching and lighting of such streets and passages, empowers the commissioners to raise a fund for the costs and charges of the first paving, cleansing and putting such streets in repair, and of purchasing a sufficient number of lamps, and fixing the same, and of building and providing watch-houses; which costs and charges are to be borne by the owners or proprietors of such of the hereditaments within the said city and suburbs, as are made subject to the rate hereinafter mentioned; and also a separate fund for defraying the charges and expenses attending the keeping of such streets and passages in repair, and of cleansing, lighting, and watching the same; which are to be paid and borne by the tenants and occupiers of such of the hereditaments within the same city and suburbs, as are made subject to the hereinafter-mentioned rate.

The former provision is as follows:—

“And be it further enacted, that the paying and defraying the costs and charges of the paving, pitching, altering, cleansing and putting in repair the said streets, squares, lanes, alleys, courts, and other public passages within the city and parishes aforesaid, and of purchasing a sufficient number of glass lamps, and of fixing the same, and also of building and providing watch-houses and stands for the same, for the first time, shall be a charge on, and shall be raised and paid by, the several owners or proprietors of the several houses, buildings, lands, tenements and hereditaments within the said city and parishes aforesaid, having such aid for that purpose as is hereinafter provided: and that, for the paying and defraying the same, it shall and may be lawful to and for the said commissioners, or any fourteen or more of them, (from and after the passing of this act,) to make, assess and impose one or more equal pound rate or rates, at their discretion, to be collected annually *at such time or times in the year as to them [368 shall seem meet, and to endure and have continuance for such term or number of years as they shall think proper, on all and every the houses, buildings, lands, &c. which are rated or rateable to the poor-rates within the city or parishes aforesaid, according to the yearly value of the same respectively; except a certain messuage or dwelling-house, together with the barns, stables, buildings, out-houses and grounds thereunto belonging, situate and being in the parish of St. Bartholomew, Hyde, now in the tenure or possession of Samuel Tewkesbury, called or known by the name of Barton farm.”

The same statute, after providing certain other exemptions from such rates, points out the mode of collecting and paying the said assessment.

The provision for raising the fund for defraying the charges and expenses of keeping such streets and passages in repair, and for cleansing, lighting and watching the same, is in these words:—

“And be it further enacted, that the charges and expenses attending the paving, relaying, repairing, lighting, watching, and keeping in repair, the said streets, &c. now in being or hereafter to be made, within the city and parishes aforesaid, after the respective pavements therein shall have been completed for the first time by virtue of this act, and also the charges and expenses attending the sweeping and cleansing, lighting and watching the same, from and after the passing of this act, and also of the defraying the salaries and wages of all officers and other persons to be appointed and employed by virtue hereof, and all incidental charges and expenses attending the execution of this act, and of the powers herein granted, shall be a charge on and be raised and paid by the tenants and occupiers of the several houses, &c. within the city and parishes aforesaid, (except all arable, meadow and pasture land, without *the walls of the said city,) and [369 also save and except all that messuage or dwelling-house, together with the barns, stables, buildings, outhouses and grounds thereunto belonging, situate and being in the parish of St. Bartholomew, Hyde, now in the

tenure or possession of Samuel Tewkesbury, called or known by the name of Barton Farm."

By an act passed in the 48 G. 3, c. ii., for amending and enlarging the powers of the before-mentioned act, it is provided, (by section 1,) that all and every the matters, powers, authorities, privileges, provisions, articles, rules, penalties and clauses, contained in the former act (with certain exceptions not material to the present case) shall be, and continue, in full force and effect, to all intents and purposes as if the same were repeated and re-enacted in such last act.

Section 10, of the last-mentioned act, provides that it shall be lawful for the said commissioners, or any fifteen or more of them, and they are thereby authorized and required, once or oftener in every year, as they shall see occasion, to cause such sum or sums of money to be raised by a rate or assessment on the several owners or proprietors of all houses, buildings, lands, &c., situate, &c., within the limits of the former act, and of such last act, (viz. the 11 G. 3, c. 9, & 48 G. 3, c. ii.,) not exceeding in the whole, in any one year, the sum of 2s. 6d. in the pound of the annual value of such taxes, lands, &c. respectively, such annual value to be, from time to time, ascertained by the respective sums such houses, buildings, lands, &c. shall be respectively rated at for the relief of the poor of the several parishes, liberties or places in which the same shall respectively stand or be, or in such other manner as the said commissioners shall think proper; and the first year for which such rate or assessment shall be made, shall commence on the feast of St. Thomas the Apostle now next ensuing, and the money
*370] thereby to arise, shall be paid by *equal quarterly payments to the respective collectors of the rates to be apportioned as aforesaid, and shall be collected, levied, paid, accounted for, and applied (except where otherwise directed by such last act) in such and the like manner as the rates authorized to be from thenceforth levied by the said recited act, on the tenants or occupiers of houses, lands, &c. were to be collected, paid, accounted for, and applied: provided always, that such rate or assessment shall not be construed, nor deemed, or taken, to extend to any place exempted by the said former and such last act, or either of them.

Section 15 enacts "that an action of debt may be brought by the clerk to the commissioners for all or any of the rates or assessments to be made by virtue of either of the before-mentioned acts."

The defendants are incorporated by an act passed in a session of parliament holden in the fourth and fifth years of His late Majesty King William the Fourth, for making a railway from London to Southampton.

By the fifth section of that act, they are empowered to make and maintain a railway, with warehouses, and suitable and commodious buildings and works, for the passage of locomotive and other engines and carriages, for the warehousing of goods and conveyance of passengers in a certain line or course, and upon, across, under or over certain lands to be delineated on certain plans and described in certain books of reference in the said act

mentioned; which line, it is provided by such act, shall commence at or near a place called Nine Elms, in the parish of Battersea, in the county of Surrey, and thence extend into and pass over, through and along certain parishes, in the said act mentioned, amongst which are the parishes of St. Bartholomew, Hyde, &c., in the said city of and suburbs of Winchester; and that the said line shall terminate in the town and county of the town of Southampton. The parish of St. Bartholomew, *Hyde, in the said act mentioned, is the same parish as that mentioned by the same [*371 name in the act passed in the 11 G. 3, as aforesaid.

Amongst the lands delineated in the said plans and described in the said books of reference, are certain lands composing and constituting part of the grounds situate and being in the said parish of St. Bartholomew, Hyde, mentioned in the said act passed in the 11 G. 3, which, at the time of the making and passing of such act, were, and are herein mentioned as being, in the tenure of the said Samuel Tewkesbury, and then and thence hitherto and still called or known by the name of Barton Farm.

The defendants completed the line of railway mentioned in the act by which they were incorporated as aforesaid, extending through the several parishes therein mentioned. The said line is now open to the public, and the defendants carry and convey passengers and goods along the same; and they are now, and at the time of making the rate hereinafter mentioned were, owners and occupiers of the same.

All and singular the lands, tenements and hereditaments of and belonging to, and which now are, and before and at the time of the making of the said rate were, occupied or used by the defendants within the said parish of St. Bartholomew, Hyde, were at the time of the passing of the before-mentioned acts of the 11 G. 3, c. 9, and 48 G. 3, c. ii., in the tenure and occupation of the said Samuel Tewkesbury, and constituted and composed part of, and were known to be, and occupied as, part of, the said hereditaments called Barton Farm, and were therefore part of the grounds and hereditaments mentioned and comprised in the before-mentioned exceptions in the rating clauses of the said acts respectively, as already set forth; and such lands, &c. of and occupied by the defendants as aforesaid continued to be and were and constituted and composed part of the said *he- [*372 reditaments called Barton Farm, and were known and occupied as such at the time they were purchased and taken by them for the purposes aforesaid under the authority of the said act of parliament.

The said lands, tenements and hereditaments, of and belonging to and occupied by the defendants in the said parish of St. Bartholomew, Hyde, as aforesaid, constitute and comprise, and at the time of the rate hereinafter mentioned constituted and comprised, the whole of their occupation in such parish. Unless they were ratable in and by such rate, in respect of the said lands, &c., they were not ratable at all in such parish, and this action cannot be sustained.

The commissioners, since the time of the passing of the said acts in the

reign of King George the Third, have, in pursuance thereof, made and imposed rates or assessments for the purposes therein mentioned, on all houses, &c., ratable and assessable by virtue of such acts; but such rates or assessments have not at any time, nor has any one of such rates or assessments been made upon or included, or comprised the whole or any part or portion of the said messuage or dwelling-house, barns, stables, buildings, outhouses, or grounds thereunto belonging, situate and being in the said parish of St. Bartholomew, Hyde, called or known by the name of Barton Farm, and at the respective times of the passing of such acts in the tenure of the said Samuel Tewkesbury, and until the making of the rate or assessment hereinafter mentioned, the same and every part and portion had been, and were and was, wholly omitted and excluded and exempted from such rates or assessments, and every of them.

The defendants, at their own costs and charges, provided lamps, lamp-posts, gas-pipes, service-pipes, water-pipes, fences, watch-boxes, and other buildings, sections, and things necessary for the maintaining, keeping, *373] *repairing, lighting, watching and watering the said line of railway, (including such thereof as are situated on that portion which lies within the said parish of St. Bartholomew, Hyde, as aforesaid,) and have also, at their own costs and charges, wholly maintained, kept and repaired, lighted, watched and watered, and do wholly maintain, &c., the said line and every part thereof: and the said commissioners do not, nor does nor do any other person or persons, body or bodies whatsoever, maintain, &c. the same or any part thereof, or contribute any money or otherwise towards the said costs and charges, or either of them, or any part thereof.

The said commissioners, on the 12th of December last, made a rate or assessment for the purposes of the said acts, for the year commencing at St. Thomas's day then next ensuing, on all buildings, lands, and hereditaments in the said city and suburbs of Winchester, including all buildings, &c., in the said parish of St. Bartholomew, Hyde, (except only such part of the said messuage, lands and hereditaments so formerly in the occupation of the said Samuel Tewkesbury as aforesaid, as then still continued to be occupied for agricultural purposes, and such other lands as were otherwise expressly exempted from such rate:) and in the said rate or assessment, the said commissioners rated and assessed the defendants for and in respect of so much and such portion of their said line of railway as lies within the said parish of St. Bartholomew, Hyde, (such portion consisting entirely of and comprising only the said grounds so as aforesaid forming part of the said hereditaments called Barton Farm, and which, at the time of the passing of the said first-mentioned act, were in the tenure of the said Samuel Tewkesbury as aforesaid, and until they were so purchased, and converted to the before-mentioned uses, by the defendants, consisted entirely of arable, *374] meadow or pasture land; and which said lands *so taken by the defendants for the purposes in that behalf aforesaid, have continually, since they were so taken, constituted part of the said line of railway,

and have not been cultivated as farm lands, or for agricultural purposes as part of the said farm,) at the gross sum of 916*l.*, the year's rate thereon at 10*d.* in the pound, by 38*l.* 3*s.* 4*d.*, the said defendants being rated to the relief of the poor in the said parish, for the same property at the sum of 970*l.*

It is admitted that the said rate was duly made, allowed and published ; that the defendants had refused to pay the same ; that the action was brought by order of the commissioners ; and that all necessary acts and steps were done and taken both by the plaintiff and the defendants before the commencement of the action, in order to raise the question at issue between them : and, for that purpose, all formal and preliminary questions, on either side, are waived.

The question for the opinion of the court is—whether, under the provisions of the said acts, the defendants are legally ratable in the said rate or assessment in respect of the said lands so occupied by them as aforesaid, the same consisting entirely of part of the grounds which, at the time of the passing of the said acts of George the Third, were in the tenure of the said Samuel Tewkesbury, and called or known by the name of Barton Farm.

If the court are of opinion that the defendants are not liable, then judgment of *nolle prosequi* is to be entered ; but if the court are of opinion that they are liable, then the defendants are to withdraw their plea, and the plaintiff is to be at liberty to sign judgment for the sum of 19*l.* 1*s.* 8*d.*

Talfourd, Serjt., for the plaintiff. There can be no doubt that the land in question is beneficially occupied *by the defendants, and is liable therefore to be rated, unless it falls within the exception in the acts [*375 mentioned in the case. And the question is, whether that exception is local, and applies to the land at all times, and to whatever use applied ; or is an exception of the farm, *as a farm* ; so that, when it ceased to be occupied as such, the general liability to be rated would re-attach to the land. There are many cases to show that where land is exempted from ratability under certain circumstances, it becomes ratable when those circumstances cease to exist ; as in the case of royal parks or premises devoted to public purposes, which, if in the beneficial occupation of any one, become ratable. But it must be admitted, that the ratability of the premises in such cases depends upon the question of beneficial occupation ; and, therefore, they have no great analogy with the present case. [CRESSWELL, J. You would hardly contend, that if a portion of Barton Farm had been let to another tenant, and occupied by him as a farm, it would become ratable.] Undoubtedly not. But it is to be observed, that in the clause of the 11 G. 3, c. 9, by which the repairing rate is authorized to be levied, (a) the exception as to Barton Farm comes after a previous exception of “all arable, meadow and pasture land, without the walls of the said city.” [TINDAL, C. J. That would seem as if the description of the farm was local, otherwise it would be excepted as arable, meadow or pasture land.] It is submitted,

(a) *Suprà*, p. 368.

that the moment the character of the land was changed, as if it were turned into streets, &c., the exemption would cease. There can be no reason why land so occupied should not be ratable. [TINDAL, C. J. There may have been a private composition with the owner of the farm.] If the whole of *376] the excepting clause is taken together, *the meaning is, to except only Barton Farm house and the grounds within the curtilage; for all arable land, &c., is previously excepted. If that be so, then the company do not occupy any part of that which is excepted. [ERSKINE, J. You must contend, that if Mr. Tewkesbury had let out one of his stables to a coach-proprietor, it would have ceased to be part of Barton Farm, and therefore would have been ratable.] It is not necessary to go that length, because that would be part of the thing expressly excepted. [CRESSWELL, J. The case finds that the land occupied by the railway company is "part of the grounds situate and being in the said parish of St. Bartholomew, Hyde, mentioned in the 11 G. 3, which, at the time of the making and passing of such act, were, and are therein mentioned as being, in the tenure of the said Samuel Tewkesbury, and then and thence hitherto, and still called or known by the name of Barton Farm;" that is, part of the grounds expressly exempted from ratability by the act.]

Sir T. Wilde, Serjt., for the defendants, was not called upon.

TINDAL, C. J. It appears to me impossible to say that the land in question does not form part of that comprised in the exemption contained in the 11 G. 3, c. 9. And there is nothing in that act, or in the subsequent act, whereby that exemption is limited.

COLTMAN, J., declined giving any opinion, having some slight interest in the question.

ERSKINE, J. I thought at first that the term "grounds," in the 11 G. 3, c. 9, might mean grounds attached to the house of Barton Farm, and not *377] arable land, &c. But the parties are excluded from that argument by the terms of the case, which finds that the lands occupied by the company are part of *the grounds* exempted. There is nothing to limit the general exemption.

CRESSWELL, J. I agree that the plaintiff is shut out from that argument by the statement in the case. Judgment for the defendants.

BURCH v. CLARA LEAKE. April 27.

Seemle, that in an action on contract, *coverture* of the defendant is an issuable plea.

THIS was an action of assumpsit, and the defendant being under terms to plead issuably, pleaded, (by attorney,) that at the time of the alleged contract, she was the wife of Henry Martin Leake. The plaintiff thereupon signed judgment, treating the plea as not issuable.

Bompas, Serjt., in Hilary term (Jan. 31) obtained a rule nisi to set aside the judgment for irregularity.

He referred to 1 Archb. Prac. 163, 7th edit., where it is said, "It seems a plea of coverture is not an issuable plea," citing *Conwell v. Thomas*, 2 W. Bl. 724; but he submitted the case referred to was not an authority for that position.

Talfourd, Serjt., now showed cause. It must be admitted that *Conwell v. Thomas* is not much in point. (a) *But, upon principle, coverture is not an issuable plea, by which is meant a plea that goes to the merits. That was distinctly laid down in *Staples v. Holdsworth*, 4 N. C. 144, 5 Scott, 432, 6 Dowl. P. C. 196. [TINDAL, C. J. In that case the proposed plea was the bankruptcy of one of the plaintiffs after the commencement of the action. That plea would only have had the effect of turning the plaintiffs round, and compelling them to bring a fresh action. (b) The defendant in this case, before the new rules, might have set up the present defence under the general issue: why should she not be allowed to put that defence upon the record? CRESSWELL, J. Formerly the plaintiff could not have objected to the plea of non assumpsit, upon the ground that the defendant meant to set up coverture as a defence under it. Why then should she not plead it?]

Byles, Serjt., was heard in support of the rule.

Per curiam;

Rule absolute. (c)

(a) In that case the defendant, having appeared as a feme-sole by an attorney, and being under terms to plead issuably, pleaded in *propria persona*, non assumpsit, describing herself as a feme covert. The court set aside the plea, and directed the defendant to plead non assumpsit, by attorney.

(b) The assignees would probably not refuse to join, or allow their names to be used, upon a sufficient indemnity.

(c) See *Wilkinson v. Page*, ante, Vol. VI. 1012.

NICKELS v. HASLAM and Others. May 1.

Letters patent were obtained for improvements in the manufacture of a certain article. The specification described a single improvement in the mode of manufacturing that article. Held, that this was not an inconsistency invalidating the patent.

CASE, for infringing a patent for "improvements in the manufacture of plaited fabrics." The declaration set out letters patent granted to the plaintiff on the 10th of February, 1842, with the usual proviso, "that if the plaintiff should not particularly describe and ascertain the nature of the said invention, and in what manner the same was to be performed, by an instrument in writing under his hand and seal, and cause the same to be enrolled in her majesty's High Court of Chancery, within six calendar months next, and immediately, after the date of the said letters patent, that then the said letters patent, &c., should utterly cease, determine, and become void;" and stated that the plaintiff did, within six calendar months, [379]

months next, and immediately, after the date of the letters patent, to wit, on the 30th of July, 1842, "in pursuance of the said proviso, and of the said letters patent, particularly describe and ascertain the nature of the said invention, and in what manner the same was to be performed, by an instrument in writing under his hand and seal; and that he caused the same to be enrolled in the said High Court of Chancery, within the said space of six calendar months next, and immediately, after the date of the said letters patent, to wit, on the 10th of August, 1842."

The fifth plea stated that the instrument in writing in the declaration mentioned to have been enrolled in the High Court of Chancery within six calendar months next and immediately after the date of the said letters patent, was and is as follows, that is to say—"In making plaited fabrics for frills and for other purposes, the folding and fastening of the plaits have been performed by hand after the fabrics used have been woven: now, the object of the invention is, to manufacture plaited fabrics by the act of weaving in a loom; and, in order that the invention may be most fully understood and readily carried into effect, I will proceed to explain the means pursued by me; and, in doing so, I will first explain the invention in its most simple form; and, in so doing, I will suppose the fabric to be made according to the invention, to be a plain tabby weaving, of linen, cotton, *380] silk, or other yarn or thread. In *explaining the invention, I will suppose that it is desired to have a fabric woven in an ordinary loom, with stripes of plaited fabric of an inch and a quarter wide, and that there shall be stripes of fabric also one inch and a quarter wide,—as is shown in the drawing hereunto annexed, which represents a portion of fabric according to the invention: in such case the warp employed would be placed on two warp-beams, that portion of the warp which goes to make the plaited fabric as shown at *a a* being warped unto one beam, and the parts of the warp which go to make the parts *b b* of the fabric being warped on to another beam; by which arrangement the two warp-beams can be differently weighted, that warp-beam which carries the spaces of warp which go to make the plaited fabric, being only lightly weighted, and the warp-beam which carries the spaces of the warp which go to make the parts *b b* of the fabric being much more heavily weighted, care being observed, that, as the warp for making the plaited fabric *a a* will be more quickly used up than the parts of the warp which go to make the parts *b b* of the fabric, that warp should be longer in proportion: the weaving is then to be carried on in the ordinary manner for weaving tabby, that is, equal warp-threads up and equal down, in forming the shed for receiving the weft, observing however that the taking up of the work is so arranged as to be done only so fast as the parts of the warp *b b* of the fabric are unwound from this warp-beam, which may be performed in any convenient manner. I usually perform the take up by means of weighted cords attached to a small dancing roller, drawing the work, as it is produced, over the breast-beam, the work being, from time to time, wound up by a work-

man, or by any convenient means. The work, as it progresses by the weft, being successively thrown in and beaten up, will be formed into plaits *a a*, in consequence of the warp which makes *those portions of the fabric being less weighted; for, it will be readily understood, that, [*381 when the weft is thrown in and the reed is beating it up, the warp for making the parts *a a*, will be more readily unwound than the parts of the warp which go to make the parts *b b*; the consequence of which will be, so soon as a quantity of weft has been thrown in and beaten up, so that the further beating up will overcome the weight of the parts of the warp *a a*, those parts will give way to the reed; and, as the weighting of the parts of the warp which go to make the parts *b b* of the fabric will resist the beating up of the weft for a longer time, the further throwing in and beating up of the weft will cause the fabric at *a a*, as made, to be formed into plaits; and the size of the plaits will, in some degree, depend on the difference of the weighting of the parts of the warp *a a* and *b b*; for, so soon as there has been a quantity of weft thrown in, which, in the beating up of the reed, will offer such resistance as will overcome the weighting of the parts of the warp *b b*, then the plaiting again commences; hence, it will be seen that the effect of the plaiting of the fabric will depend upon the relative speeds at which the two sets of warp-threads *a a* and *b b* are unwound; for, if they were equally weighted, or otherwise all delivered at the same speed, the fabric produced would be equal in all parts; but, as the one set *b b* is controlled to be delivered slower than the other set *a a*, the set of warp-threads *a a* will be more quickly used up, whilst the weft-threads will be more closely beaten up on the set of warp-threads *b b*. I have here spoken of the warp-threads *a a* and *b b* being governed by the difference of weighting, in order to regulate their being delivered from their warp-beams at different speeds, that being the means at present practised: but it will be evident that other means of regulating and governing the delivery of the warp-threads *a a* and *b b*,—so that they are *delivered at different speeds, according to the plaits desired to be made,—may be resorted to in place of difference of weighting of the two sets of threads. [*382 In the above description I have explained the invention in the simplest form: but it will be evident, that,—besides tabby weavings,—twills, satins, and other, plain as well as ornamental, weavings, may be made either in the plaited or unplaited parts of the fabrics; and such plain and ornamental weaving will be performed in the ordinary manner, and as is well understood; for a weaver will perceive that the order in which the various threads of the parts *a a* of the warp are lifted in respect to each other, so as to vary the pattern of fabric produced, will not interfere with the fabric *a a* being plaited according to my invention: and such is the case in respect to the fabric made by the parts *b b* of the warp-threads. And, although I have only mentioned two warp-beams or rollers being used, a greater number may be employed, care being observed to weight, or regulate, them correctly, according to the effect desired. In some cases it is desirable, that the parts *b b*

should be made double, so as to receive cotton or other filling, or whale-bone. In such cases I divide the parts *b b* into two warps, in the ordinary way of making double fabric, and as is well understood. By such means of weaving as are above described, plaited fabrics may be manufactured with facility, the plaits being securely held, or tied, by the intermediate portions of the fabric. Having thus described the nature of the invention, and the manner of performing the same, I would have it understood that I do not confine myself to the precise details above given, provided the peculiar character of the invention be retained: and it is not necessary that the parts *a a* and *b b* of the warps should be of the same materials; as they may be varied according to the effect desired to be obtained. But what I

*383] claim, is, the mode of weaving "plaited fabrics by dividing the warp into separate sets or parts, and causing the separate sets or parts to be delivered at different speeds, as the weaving of the weft proceeds." The plea further stated that there was, and still is, attached to the said instrument in writing, a certain drawing, with letters and figures marked thereon, and a copy of which drawing was thereunto annexed; and that no instrument in writing under the hand and seal of the plaintiff, other than and except the said instrument in writing thereinbefore set forth and contained, was enrolled in the said Court of Chancery within six calendar months next and immediately after the date of the said letters patent, in pursuance of the proviso in the said letters patent in that behalf contained; and that thereby, and by reason thereof, the said letters patent became and still were of no force and effect—verification.

To this plea the plaintiff demurred generally.

Byles, Serjt., (with whom was *Corrie*.) in support of the demurrer. The specification is perfectly intelligible; and it is consistent with the letters patent. He was stopped by the court.

Channell, Serjt., (with whom was *Webster*.) in support of the plea.(a) The specification is inconsistent with the title of the patent. The point as

*384] to unintelligibility does "not arise. The plaintiff, by his specification, does not claim any improvement in the article to be manufactured. He does not show that a better, or a cheaper, article can be produced. He professes to describe a better mode of accomplishing the manufacture,—an improved method of manufacturing certain known fabrics, accomplishing in the loom what was before done by hand, by combining several things, not stating whether they are new or old. The court cannot assume that there is novelty.

The title of the letters patent is too large: it describes them as granted

(a) The points marked for argument on the part of the defendants were—"That the instrument in writing or specification in the fifth plea, is insufficient, and does not comply with the proviso of the letters patent, in the following respects:—That the specification does not describe and ascertain any improvements in the manufacture of plaited fabrics, and in what manner the same are to be performed—that the invention described and ascertained in the specification, is not the invention for which the letters patent were granted—that the specification is inconsistent and repugnant with itself and the letters patent—and that the specification is inconsistent with, and does not support the title of, the said letters patent."

for "*improvements* in the manufacture of plaited fabrics," whereas a single improvement only is suggested by the specification; and it is quite clear, that if, in the title of a patent, several improvements in a manufacture are mentioned, and one of the improvements claimed is not new, the patent is void; *Morgan v. Seaward*, 2 M. & W. 544. The suggestion is false; (a) the patent has been obtained by means of a false representation made to the Crown; though it is possible that it might be set right by a disclaimer. [CRESSWELL, J. What has the plaintiff to disclaim?] It is not for the defendant to make out a case for a disclaimer. [COLTMAN, J. I do not see how he can say, that there is any *one* improvement. Must not you show that there is only one improvement? TINDAL, C. J. Are there not several improvements here?] The plaintiff can only be considered as claiming in respect of one improvement by a combination of processes. He does not state that any one particular process is new. Either the specification is unintelligible, or it amounts to the statement of a combination.

Byles, Serjt., in reply, was stopped by the court.

*TINDAL, C. J. The objection raised by this plea resolves [*385 itself into something very much like that which was taken in a case which we had in the Exchequer Chamber, last term. In that case—*Cooke v. Pearce*, (b)—it was held, that an objection cannot be taken to the title of a patent, unless some fraud upon the Crown or detriment to the public can be shown. Here, the objection is only to the title, as describing the patent to have been granted for improvements in certain manufacture, whereas the specification discloses only one improvement. This is certainly a most subtle objection; if the term improvement had been used, it would have been *nomen collectivum*, and would have covered any number of improvements. I cannot see why the variance, if it be one, should vitiate the patent, the objection being merely to the title of the patent, without fraud upon the Crown or detriment to the public. On this ground, I think that the plaintiff is entitled to judgment.

COLTMAN, J. I think the title of this patent is true. The claim is not made for any improvement separately, but for the whole. Whether the plaintiff could have claimed for each, is a matter not before us. I do not see how that question can now be raised. For any thing that appears on the face of the plea, the invention may consist of more improvements than one I think there is no objection to the title. Though the plaintiff confines himself in his specification to one improvement, it does not follow that the combined processes are not properly described as several improvements.

ERSKINE, J., was at chambers.

CRESSWELL, J. I cannot say that the plaintiff has not complied with the condition in the letters patent.

Judgment for the plaintiff.

(a) *Vide Gledstanes v. The Earl of Sandwich*, ante, Vol. IV. p. 995, 1030(b).

(b) In error from Q. B., 13 Law Journ. N. S. 189.

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*BOODLE v. CAMBELL. May 3.

To a declaration in debt by A. against B. for 191*l.* 5*s.* due for 2½ years' rent under a demise, by indenture, B. pleaded as to 40*l.* 10*s.*, parcel, &c., that, before the making of the indenture, A. conveyed parcel of the demised premises to C., in fee, who devised the same to D., his wife, and E. and their heirs; that, *after the commencement of the suit*, D. and E. gave notice to B. of their title, and required him to pay them such portion of the rent, not paid over to the plaintiff at the time of the giving of the said notice, as might, on a just apportionment, be found to be the just proportional part thereof in respect of the said parcel of the demised premises; and D. and E. then gave notice to, and threatened B., that if he should neglect or refuse forthwith to pay over such proportional part to D. and E., they would immediately eject and expel him from the said parcel; that the said sum of 40*l.* 10*s.* was the sum which, upon a just apportionment of the said rent, would be, and was, the proportional part of the rent in respect of the said parcel, and was at the time of the notice unpaid to A.; that the rent sued for accrued and became due after the death of C.; that, if B. had not paid the 40*l.* 10*s.* to D. and E., they would have proceeded to eject and expel the defendant from the said parcel of the demised premises, wherefore P., *after the commencement of the suit*, necessarily and unavoidably paid them that sum; and that A. never had any thing in the said parcel of the demised premises, except as appeared in that plea: *Held*, that this was neither a good plea of eviction, the notice being subsequent to the rent becoming due; nor a good plea of payment, inasmuch as the alleged payment was not in satisfaction of any charge upon the land or of any debt due from A.

DEBT, for 191*l.* 5*s.* due upon a covenant.

The declaration stated that on the 27th of July, 1840, by a certain indenture then made between the plaintiff of the one part, and the defendant of the other part, the plaintiff demised unto the defendant certain lands and tenements, *habendum* from the 25th of March then last past, for the term of ten years thence next ensuing; yielding and paying therefore, yearly during the term, unto the plaintiff, her heirs, or assigns, the yearly rent of 76*l.* 10*s.*, by equal half-yearly payments, on the 29th of September and the 25th of March in every year, the first half-yearly payment to be made on the 29th of September then next ensuing; and the defendants did thereby covenant with the plaintiff that he the defendant would, during the term, pay unto the plaintiff the said yearly rent, on the days and at the times thereinbefore

*387] appointed for payment thereof, *without any deductions. Averment, that by virtue of this demise the defendant, afterwards, &c., entered upon the demised premises, and was possessed thereof for the term so to him therein granted: Breach—that after the making of the indenture, and during the term, to wit, on the 29th of September, 1842, 191*l.* 5*s.* of the rent aforesaid, for two years and the half of another year of the said term, ending on the day and year last aforesaid, became due from the defendant to the plaintiff, and still was in arrear and unpaid. The declaration stated by way of excuse of profert, that the indenture was in the possession of the defendant.

Third plea, as to the sum of 40*l.* 10*s.*, parcel of, &c., that, before and at the time of the making of the indenture of lease next thereafter mentioned, the plaintiff was seised, in her demesne as of fee, of and in parcel of the demised premises, to wit, one full and undivided moiety of and in certain closes, parcel of the said demised premises, called, &c.; and the plaintiff being so seised, afterwards *and before the making of the indenture in the*

declaration mentioned, to wit, on the 31st of December, 1838, oy a certain indenture of bargain and sale, then made between the plaintiff and Edward Boodle, the plaintiff, in consideration of 5s. then therefore paid by Boodle to the plaintiff, did bargain and sell the said parcel of the said demised premises to Boodle, *habendum* to Boodle, his executors, &c., from, &c., for the term of one whole year, &c., *prout patet*; by virtue of which indenture, and by force of the statute, &c., Boodle then became possessed of the said parcel for the said term so to him therein granted: And the plaintiff being so interested, and Boodle being so possessed as aforesaid, afterwards, and *before the making of the indenture in the declaration mentioned*, to wit, on the 1st of January, 1839, by a certain indenture of release then made between the plaintiff of the first part, Boodle *of the second part, and [388 Richard Parry Jones of the third part, the plaintiff released the said parcel to Boodle, *habendum* unto Boodle and his heirs for ever, to such uses as Boodle should in the manner therein mentioned appoint; and, in default of such appointment, to the use of Boodle and his assigns for his life, *sans* waste; and, from the determination of that estate in his lifetime, to the use of Jones, his executors and administrators, during the life of Boodle, in trust for Boodle and his assigns during his life; and, from the determination of the estate so limited to Jones, his executors and administrators, to the use of Boodle, his heirs and assigns for ever: and by the last mentioned indenture Boodle declared that any wife of his who should become his widow, and who, but for such declaration, would or might, notwithstanding the uses and limitations thereinbefore contained, be entitled to dower out of the hereditaments thereby released, should not have or be entitled to dower, or any right, title, or interest to the same or any part thereof; and thereupon Boodle then became seised, in manner aforesaid, of the said parcel. And Boodle, being so seised, afterwards, to wit, on the 16th of February, 1841, duly made and published his last will and testament in writing, bearing, &c., and signed by him, Boodle, and attested and subscribed in the presence of Boodle by two credible witnesses; and thereby, amongst other things, devised the said parcel of the demised premises to his wife Ann Boodle and John Pickstock, *habendum* unto and to the use of Ann Boodle and John Pickstock, their heirs and assigns: E. Boodle, afterwards, to wit, on, &c. died so seised, without having made any appointment, and without having altered or revoked his said will; whereupon and whereby Ann Boodle and John Pickstock then became and thence had been and still were seised of the said parcel of the demised premises, as of fee: That the plaintiff, at the time of *the making of the indenture of release, and thence unto [389 and at the time of the making of the indenture in the declaration mentioned, was in possession of the said parcel of the demised premises: *That, after the commencement of the suit, and before that day, to wit*, on the 9th of January, 1843, Ann Boodle and Pickstock gave notice to the defendant of the premises in the plea mentioned, *and then required the defendant to pay to them* such portion of the said rent reserved by the indenture in the

declaration mentioned not paid over to the plaintiff at the time of the giving of the said notice, as might, on a just apportionment of the said rent, be found to be the just proportional part thereof in respect of the said parcel of the demised premises; and *Ann Boodle and J. Pickstock then gave notice to the defendant and threatened the defendant, that, if he should neglect or refuse forthwith to pay over to Ann Boodle and J. Pickstock such proportional part of such rent, they would immediately proceed to eject and expel the defendant from the said parcel of the demised premises, and should duly put the law in force against the defendant as they might be advised*: That, at the respective times when the said parcel of the said debt became due as in the declaration mentioned, and when the said notice was given, the said sum of 40*l.* 10*s.* was and yet is the sum which, upon a just apportionment of the rent reserved by the indenture in the declaration mentioned, would be, and was, the just proportional part of the said rent in respect of the said parcel of the demised premises; and that, at the time of the giving of the said notice, the said sum of 40*l.* 10*s.* was wholly unpaid to the plaintiff: That the rent whereof the said sum of 40*l.* 10*s.* was parcel as aforesaid, accrued and became due to the plaintiff under and by virtue of the indenture in the declaration mentioned, after the death of E. Boodle, to wit, for the period which elapsed *390] between the 29th of September, *1841, and the said 29th of September, 1842: That, if the defendant had not paid to Ann Boodle and J. Pickstock the said sum of 40*l.* 10*s.*, Ann Boodle and J. Pickstock would have proceeded to eject and expel the defendant from the said parcel of the demised premises, and to put the law in force against him, pursuant to the said notice: Wherefore the defendant, afterwards, and after the commencement of the suit, and before that day, to wit, on, &c., did necessarily and unavoidably pay to Ann Boodle and J. Pickstock the said sum of 40*l.* 10*s.*; as he lawfully might, for the cause aforesaid: And that the plaintiff never had any thing in the said parcel of the demised premises except as appeared in that plea. Verification. Profert was made in the plea of the indenture of the 31st of December, 1838.

Special demurrer to this plea, assigning for causes—that it altogether denied the title of the plaintiff, and, in fact, amounted to a special plea of *nil habuit in tenementis* as to parcel of the premises, which the defendant was estopped from pleading (a)—that it contravened the rule of law that a tenant shall not dispute his landlord's title, and the rule of law that a man shall not contradict his own indenture, &c. Joinder.

Channell, Serjt., (with whom was *Willes*), in support of the demurrer.—This plea, which is in bar only of the further maintenance of the action, is clearly bad in substance. It is not a plea showing an assignment by the lessor of part of the premises, but on being examined will be found to be an informal plea of eviction; and, if so, it is defective for not showing that

(a) Vide 4 Nev. & M. 29. The estoppel by the indenture appearing on the record, the plaintiff might avail himself of it on demurrer without replying the estoppel. 1 Wms. Saund. 325 (note 4).

the alleged eviction took place before the rent became due; *Com. Dig. Pleader*, (2 W. 50). An attempt will be made to liken *this case [391 to that of a payment to a party having title paramount; but, although there are cases which, at first sight, appear to resemble the present, on examination, they will be found to be distinguishable. In *Sapsford v. Fletcher*, 4 T. R. 511, the land was subject to a ground-rent, and the payment of it by the tenant was a compulsory payment of the debt of his landlord. So, in *Taylor v. Zamira*, 6 Taunt. 524, where, to an avowry for rent, it was held to be a good plea, that, before the lessor had any thing in the land, a termor granted an annuity or rent-charge, and granted and covenanted that the grantee might distrain on the premises; that the annuity was in arrear, and the grantee demanded it, and threatened a distress; and that the plaintiff paid her the amount of the rent due to the avowant, and so nothing in arrear—the payment to the grantee of the annuity was treated as a payment to the avowant, inasmuch as it was a charge on the land. So, *Pope v. Biggs*, 9 B. & C. 245, 4 Mann. & Ryl. 193,(a) proceeded upon the same principle as the two former cases, inasmuch as the land was subject to a mortgage, and payment to the mortgagee was held an answer to an action for rent by the mortgagor. Here, there was no charge upon the land, nor is there a payment of any debt due from the plaintiff.

Talfourd, Serjt., (with whom was *E. V. Williams*,) *contra*. This is neither a plea of *nil habuit in tenementis*, nor a plea of eviction: it is a special plea of payment. In *Pope v. Biggs*, the mortgagee was held to be entitled not only to the rent to become due, but to that which was then due, so as to make that case approach very near to the present. *Johnson v. Jones*, 9 Ad. & E. 809, 1 P. & D. 651, still more closely resembles this. There, to an avowry of a *distress for rent, the plaintiff pleaded, [392 that, before the defendant had any interest in the premises, they were mortgaged in fee; (b) that the mortgagor remained in possession, and demised to the defendant: that the defendant, the mortgage money being still due, demised to the plaintiff; that afterwards, the mortgage money being still due, and interest thereon, and 14*l.*, avowed for by the defendant, being also in arrear, the mortgagee gave notice to the plaintiff to pay the 14*l.* to him instead of to the defendant, and threatened, in case of non-payment, to put the law in force, and was then about to put the law in force, wherefore the plaintiff necessarily paid that sum to the mortgagee, and so the said sum was not in arrear; concluding with a verification. It was

(a) As to the grounds of the decision in that case, see 4 Mann. & Ryl. 193 (a).

(b) This amounted to an allegation, that, at the time of the demise, the lessor had no *legal estate*, i. e. *no estate*, in the premises. But if the demise was by indenture, (as the avowry showed it to be,) the demise itself created a *legal estate* in fee by estoppel, as between the lessor and the lessee. The precedent mortgage, to be a charge upon the new fee by estoppel gained by the demise by indenture, must be considered as a charge created by a stranger, who afterwards acquired the fee. That, however, does not appear to have been the character of the defence set up in *Johnson v. Jones*. It would, perhaps, have been difficult to present the *equitable* grounds for relief which existed in that case, in any form of plea which would have been consistent with the law of estoppel or with our feudal rules of tenure.

held, on special demurrer, that the plea was good, being a plea of payment, and not of *nil habuit in tenementis*; and that it was not bad for setting out the circumstances of the payment, or for concluding with a verification. The only difference between that and the present is, that it was the case of a mortgage, and this of an absolute conveyance, and that there the whole premises were mortgaged, and here a part only was conveyed. Lord DENMAN there said: "This is not a plea of *nil habuit in tenementis*, but of payment. It was *393] certainly necessary for the plaintiff's purpose to *show a defect of title in the lessor; but the plaintiff does not set that up by way of avoiding the lease, but merely to show that it brought upon him the necessity of paying the interest on the mortgage, through the lessor's default, and that such payment was for the lessor's benefit. This plea does not appear to me to differ substantially from the pleas in *Sapsford v. Fletcher* and *Taylor v. Zamira*, where payments made in exoneration of charges on the demised premises were allowed to be pleaded in satisfaction of rent." And LITTLEDALE, J., said: "Where a lessor avows for a distress for rent, a plea that another person had a prior title to his, without an averment of eviction, is not good. But this is not a plea of *nil habuit in tenementis*; it shows only, that, before the lease, another person had an interest in the demised premises, by way of charge upon them: but, *non constat* therefore, that the lessor had not power to make the lease. The plea merely states that the lease was made subject to such charge; that 14l. was due for rent to the defendant; and that the plaintiff, upon notice from the mortgagee, paid that sum to him, not as rent, but in satisfaction of the interest due to him upon his mortgage. Both *Sapsford v. Fletcher* and *Taylor v. Zamira* are authorities for the plaintiff. In those cases the lessor had not an entire interest, but held subject to certain charges; it can make no difference whether the charges are by way of mortgage, annuity, or *any thing else*." In one respect this case is stronger than that of *Johnson v. Jones*; for here there was a distinct threat to bring an ejectment; whereas in *Johnson v. Jones* there were only some vague expressions as to putting the law in force.

Channell, Serjt., in reply. *Johnson v. Jones* is clearly distinguishable from the present case. It only follows up the doctrine laid down in *Sapsford v. Fletcher*, *Taylor v. Zamira*, and *Pope v. Biggs*. In all *394] of those cases, there was, at the time of the demise, a charge upon the land; and they decide, that where there is such a charge, the tenant may treat a payment to the party having such charge as a payment to the lessor. Here, there is no charge at all upon the land, and no debt due in respect thereof from the plaintiff; and both of those circumstances ought to have concurred to make the payment in this case good. It is a settled rule of law, that a right of action can only be discharged by a release, or by something amounting to accord and satisfaction. At the most, the plea can only amount to a plea of eviction, and is bad for the reason already given.

TINDAL, C. J. It appears to me that this plea cannot be supported. It must be considered either as a plea of eviction and expulsion, or as a plea

of payment of a portion of the rent by compulsion to some one authorized to receive it, by reason of having a charge upon the land. If it is to be looked upon as a plea of eviction, the defendant was bound to show that the eviction took place before the rent became due. So far from that being so, the fact is otherwise, for the alleged eviction does not appear to have taken place until after action brought. The plea, therefore, as a plea of eviction, affords no answer to the plaintiff's claim. Is it then a plea in the nature of a plea of payment to a special agent of the landlord? The cases that have been cited are distinguishable. In *Sapsford v. Fletcher*, 4 T. R. 511, there was a claim for ground-rent; and the tenant was liable to a distress unless he paid it. Having paid the ground-rent in order to relieve himself from that pressure, it was held that he might treat such payment as a payment to his immediate landlord. So, *in *Pope v. Biggs*, 9 B. & C. 245, 4 Mann. & Ryl. 193, where the premises had been mortgaged, and the tenant received notice from the mortgagee, who demanded the rent, and received it in satisfaction of interest due upon the mortgage; it was held that this was a good payment. There, the principal, at least, was a charge upon the land; and it might be considered, that the mortgagor had appointed the mortgagee his agent to receive the rent if he thought fit to demand it.(a) Here, the plea alleges that the plaintiff, before making the lease to the defendant, conveyed part of the property in respect of which the rent is claimed, to one Edward Boodle, whose devisees, after the commencement of the action, set up a claim to a proportional part of the rent. On what ground is it that the sum of 40*l.* 10*s.*, rather than any other sum, has been fixed upon as the proportional part of the rent to which these devisees are entitled? What power is there to apportion the rent? Where a party, having granted a lease of premises, afterwards parts with a portion of them, the tenancy is still subsisting; and the law steps in to apportion the rent between the parties entitled.(b) But the doctrine of apportionment does not apply here. The defendant is not tenant of part of the premises to the devisees of E. Boodle. Those parties are not before the court; and the jury could not apportion the rent. In so doing they would be taking upon themselves to make a division, when one of the parties would not be bound by, and might not be satisfied with the apportionment. There is this further difficulty; it does not appear that this sum of 40*l.* 10*s.* is any charge upon the land at all. The devisees might *choose to have the land back again, and the defendant is not paying a sum for which the plaintiff is liable. It seems to me, therefore, that on neither ground is this plea an answer to the action, not being so either as a plea of eviction or as a plea of payment, and that the plaintiff is entitled to judgment. [*396]

COLTMAN, J. I also am of opinion that this plea is bad, on the grounds

(a) But the judgment in *Pope v. Biggs* appears to have proceeded upon less plausible grounds, vide 4 Mann. & Ryl. 193 (a).

(b) Vide Co. Litt. 148 a, *Roberts v. Snell*, ante, Vol. I. 579, 589.

stated by the Lord Chief Justice. If it is to be treated as a plea of eviction, it alleges an eviction subsequent to the time of the rent becoming due, and is insufficient on that ground. Neither do I think that it can be considered as a plea of payment. If it is to be so treated, it must be the payment of a debt due from the plaintiff; but it does not appear that there was any debt due from the plaintiff to Ann Boodle and John Pickstock. It may be that they might have some remedy against him for their share of the mesne profits: but by the conveyance to them by the plaintiff of part of the premises, no debt has been constituted between them.

ERSKINE, J. I am of the same opinion. This plea cannot be held bad on the ground that it amounts to a plea of *nil habuit in tenementis*, for the reasons given in *Sapsford v. Fletcher* (a) and *Pope v. Biggs* (b). But it cannot be treated as a plea of payment, there being no debt due from the plaintiff to Ann Boodle and John Pickstock, nor any charge on the land, so as to fall within *Johnson v. Jones*, 9 Ad. & E. 809, 1 Perr. & Dav. 651. As a plea of eviction, it is bad, as already observed, for not showing an eviction before the rent became due.

*397] *CRESWELL, J. In *Johnson v. Jones*, LITLEDAL, J., held the plea to be good; not as a plea of *nil habuit in tenementis*, nor as a plea of eviction, but because it showed that the lease was made subject to a prior charge, viz., a mortgage, which the tenant was compelled to pay. I agree that the present plea is not a plea of *nil habuit in tenementis*. It is either a plea of eviction, bad because it alleges an eviction subsequent to the rent becoming due; or a plea of payment, bad because it shows neither a payment to the plaintiff nor a payment made by his authority. Neither does it set up a payment of a debt due from the plaintiff, or of a charge upon the land, so as to bring the case within any of the cases cited.

Judgment for the plaintiff.

(a) And see T. 41, E. 3, Fitz. Abr. tit. *Accompt*, pl. 33; F. N. B. 116, Q. n.; 1 Vin. Abr. 161, pl. 8, 9.

(b) Vide *suprà*, 395 (b).

HARPER v. PHILLIPPS. May 3.

The issue, as set out in a writ of trial, stated the suing out of a former writ of summons, to meet a plea of the statute of limitations. The plaintiff having obtained a verdict, upon an issue taken on the accrual of the action within six years, the court refused to grant a new trial, upon an affidavit that no such writ had ever been returned, and that no continuances had been entered on the roll, and that the issue delivered contained no notice of a former writ.

DEBT, for goods sold and delivered, work, labour, and materials. The defendant paid 1l. 6s. into court, and to the residue pleaded *nunquam indebitatus*, and the statute of limitations, to which the plaintiff replied by *simply taking issue*.

At the trial before the under-sheriff of Gloucestershire, it appeared tha

the goods had been supplied and the work performed in 1836. The date of the writ of summons was the 27th of January, 1844; but, by [398] the issue, it was alleged that the plaintiff had sued out a former writ on the 28th of January, 1841.(a)

Talfourd, Serjt., upon an affidavit stating that no writ had ever been returned, and no continuances entered, and that the issue *delivered* contained no notice of any former writ, moved to set aside the writ of trial and subsequent proceedings for irregularity. The objection was overruled by the under-sheriff, who said that he could only deal with the writ of trial before him. [CRESSWELL, J. Your real objection appears to be, that the issue was incorrectly made up. If not, I do not see how you can stir.]

TINDAL, C. J. It seems to me that the defendant should not have this rule. He should have come promptly to the court or to the judge at chambers to set the issue aside.

COLTMAN, J. The trial seems to have been perfectly right. I agree that we ought not to interfere with the issue at this stage of the proceedings.

The rest of the court concurred.

Rule refused.(b)

(a) By the uniformity of process act, (2 & 3 W. 4, c. 39, s. 10.) it is provided, that no writ shall be available to prevent the operation of any statute whereby, &c., unless the defendant shall be . . . served therewith . . . or unless such writ and every writ (if any) issued in continuation of a preceding writ, shall be returned *non est inventus* and entered of record, within one calendar month next after, &c., and unless every writ issued in continuation shall be issued within, &c., and shall contain a memorandum specifying the day of the date of the first writ.

(b) *Quære*, whether the special matter should not have been replied.

*CLINTON v. PEABODY. May 4.

[399]

In trover for certain United States treasury notes, the defence set up was, that the notes had been forged by the plaintiff, who offered them for sale to the defendant, by whom they were detained, and that to prove this it was necessary to send out a commission to examine witnesses in America. On granting the commission, the court required the defendant to deposit the notes with the masters. On the motion of the defendant, a rule was subsequently made for delivering out the notes to some person to be agreed on, or to be named by the master, for the purpose of producing them to the witnesses under the commission, the defendant giving security to the satisfaction of the master for their safe return, and depositing *fac similes* in lieu of them.

The court considered that this rule was complied with by depositing *fac similes* exhibiting in outline the figures and emblematical devices on the face of the notes, together with a tracing of the endorsements.

TROVER, for the conversion of four United States treasury notes, for 1000 dollars each.(c)

The defence intended to be set up was, that the plaintiff either had forged, or uttered, a forged deposit note, of which forgery the notes in question were the proceeds. It was also alleged that one, if not more, of the endorsements on these notes was forged.

In Hilary term last, a rule was obtained on the part of the defendant, for a commission to examine witnesses in New York and in other parts of the

(c) The plaintiff had also brought an action against the defendant, for false imprisonment.

United States; and it was made a part of the rule, that the notes should be deposited with the masters of the court.

Sir *T. Wilde*, Serjt., on the first day of this term, obtained a rule calling upon the plaintiff to show cause why the notes so deposited should not be delivered out to the defendant or his attorney, in order that they might be produced to the witnesses to be examined under the commission, and also why the time for returning the commission should not be enlarged.

Talfourd, Serjt., showed cause. It is no available defence in this action *400] that the plaintiff, by means of *a forgery, obtained the funds where-with he purchased the notes in question. The only object of the rule is to delay and embarrass the plaintiff. Moreover, the defendant has had ample time to examine his witnesses.

Sir *T. Wilde*, Serjt., was heard in support of the rule.

TINDAL, C. J. The question is, not whether the facts sworn to on the part of the defendant afford a complete answer to the action, but whether they are material and fit to be inquired into. The object of seeking to have the notes delivered out of the hands of the court is, that the commission already issued may be made useful, which it clearly could not be unless the notes were not produced to the witnesses, who are to be examined under it. Upon proper security being given, it seems to me the notes ought to be delivered out to such person as the master may appoint, copies being deposited in their place.

CRESSWELL, J., suggested that fac-similes should be made, and left with the master, in lieu of the original notes.

The rest of the court concurring.

Rule absolute.

The rule was drawn up in the following terms:—"That, upon the defendant giving, and entering into, such security as shall be approved of by one of the masters of this court, for the due return of the notes, for the recovery of which this action is brought, and which are now in the hands of the masters of this court, to the value of such notes, the same to be delivered out by the said masters to such person as shall be agreed upon between the said parties, or, in case they shall *differ about the same, then *401] to such person as the said masters shall appoint to receive the same, for the purpose of the said notes being produced to the respective witnesses to be examined in America on the execution of the commissions issued respectively in this cause, &c., and that the same notes respectively be forthwith returned to the said masters immediately after the execution of such commissions. And it is further ordered, that the said notes shall be produced to the respective parties and their agents, upon request, but the same shall not be under the control of either of the said parties, during the time they shall be in the possession of the person to whom they shall be so delivered out as aforesaid; and that, before the same shall be so delivered out, fac-similes of the said notes shall be

taken, at the expense of the defendant, and that the said fac-similes shall be deposited with such masters, at the time of their delivering up the said notes as aforesaid. And it is also ordered that the return of the said commissions in this cause be enlarged to the 2d of November next, and that the trial be postponed to the sitting after Michaelmas term next."

A bond with sureties to the master's satisfaction was afterwards given, and fac-similes of the notes, with the several figures and devices thereon, and also of the endorsements thereon, were deposited with the master. It was objected, however, by the plaintiff's attorney, that the copies made were not *perfect* fac-similes, the ornamental parts being in *outline* only, and therefore not a sufficient compliance with the rule.

**Dowling*, Serjt., in Trinity term, obtained a rule to show cause [402 why the copies thus made should not be deemed a compliance with the rule, and the original notes delivered out pursuant to the former rule. He submitted that the parties would be in danger of bringing themselves within the provisions of the 11 G. 4, & 1 W. 4, c. 66, s. 19, if they caused the notes to be more closely imitated.

Talfourd, Serjt., showed cause. The copies made and deposited are wholly inadequate to answer the plaintiff's purpose; he is therefore desirous of holding the defendant to a strict performance of the rule of last term. [TINDAL, C. J. The copies are, as nearly as may be, fac-similes: the loss of the originals is a very distant probability.] The plaintiff fears, that, when the notes get to New York, they will be attached there, as a fifth note has already been.

Dowling, Serjt., in support of his rule. As far as could reasonably be expected, every thing has been done towards complete performance of the terms of the rule.

TINDAL, C. J. As much has been done as could, under the circumstances, be expected. It was a somewhat unusual interference with the rights of the defendant in trover, to take the property in dispute out of his hands at all.(a)

Per curiam;

Rule absolute.

(a) The plaintiff in trover complains that the defendant has converted the chattel to his own use; and he asks for a judgment, by which, when obtained, he would appear to be estopped from saying that the property in the chattel was not vested in the defendant from the period of such conversion. Vide *antè*, Vol. VI. p. 640 (a).

*403] *BARNEWALL v. WILLIAMS. May 4.

In detinue for a picture, the court allowed a plea of "lien" to be pleaded with pleas of "*non detinet*" and "not possessed."

DETINUE, for a picture, &c. The defendant applied at chambers for leave to plead *non detinet*,—that the plaintiff was not lawfully possessed of the picture, &c., as of his own property,—and a lien. The learned judge disallowed the plea of lien, as unnecessary.

On a former day in this term,

Sir T. Wilde, Serjt., moved for a rule to show cause why the defendant should not be at liberty to add the plea which had been so disallowed. There would be no objection to the view taken by the learned judge at chambers, but for the recent decision of the court of Exchequer in *Mason v. Farnell*, 12 M. & W. 674, 1 Dowl. & Lowndes, 576. (a) The court there held that in detinue, a defence that the defendant is tenant in common with the plaintiff cannot be given in evidence under "*non detinet*" or not possessed. [TINDAL, C. J. Is there any distinction in this respect between detinue and trover?]

A rule nisi having been granted,

Shee, Serjt., now showed cause. It has repeatedly been held, that, in trover, a lien may be given in evidence under the plea of not possessed; *Owen v. Knight*, 4 New Cases, 54, 5 Scott, 307, 6 Dowl. P. C. 244; *Buller v. Hobson*, 4 N. C. 290, 5 Scott, 798; and it is difficult to perceive the validity of the distinction suggested in *Mason v. Farnell*. (b)

*404] *Per curiam. If there be reasonable doubt, the defendant is entitled to have the additional plea. After the case of *Mason v. Farnell*, we think the proposed plea should be allowed. Rule absolute

(a) And see *Leake v. Loveday*, ante, Vol. V. p. 972, 5 Scott, N. R. 923, 2 Dowl. N. S. 623.

(b) In this case *Parke, B.*, in delivering the judgment of the court, says, "There is no doubt that in the action of trover the Court of Common Pleas, in *Owen v. Knight*, 4 New Cases, 54, 5 Scott, 307, have decided, that under the plea of *not possessed*, the defendant may give in evidence a lien, on the ground that this plea denies the plaintiff's right to the immediate possession of the goods, as well as his property in them; and in the case of *White v. Teal*, 12 Ad. & E. 106, 4 P. & D. 43, the court of Queen's Bench held, on similar grounds, that such a defence was not admissible under not guilty. It is proper to abide by the authority of these decisions, in the action of trover, though, no doubt, plausible reasons may be assigned for saying that the proper plea on which such a defence as a lien or the like may be made, is the plea of *not guilty*, by which the conversion is denied; but we are of opinion, that, in the action of detinue, this plea of not possessed cannot have the same effect. In this form of action we are not embarrassed with the difficulty which exists in the action of trover founded on conversion, which is always a wrongful act, (a) and cannot therefore be confessed and avoided. (b) The detainer, which alone is an issue under *non detinet*, may be lawful or unlawful, and therefore it may be denied altogether, or may be admitted and justified as a lawful act; and this we find supported by the older authorities." * * * "The plea of not possessed, we think, on these

(a) *Quare*, whether a plea of not possessed, is not a plea in confession of the conversion declared on, and in avoidance, by showing that the plaintiff is not entitled to treat the conversion as illegal as against him.

(b) In *Sturt v. Drungold* a plea in trover, justifying the detention of a horse by an inn-keeper, for food provided before the conversion, was held good on demurrer, 3 Bulst. 289.

authorities, Co. Litt. 283 a; (a) *Isark v. Clarke*, 1 Roll. R. 126, 2 Bulst. 306, (b) puts only the property of the plaintiff in issue; (c) and if, therefore, the plaintiff has such a property as will enable him to maintain detinue, it is enough."

(a) "In detinue the defendant pleadeth *non detinet*; he cannot give in evidence, that the goods were pawned to him for money, and that it is not paid, but must plead it; but he may give in evidence a gift from the plaintiff." But Lord Coke adds, "for that proveth he detaineth not the plaintiff's goods."

(b) S. C., Sir F. Moore, 841.

(c) In replevin of a ship, the defendant justified as part-owner with the plaintiff; M. 11 H. 4, fo. 13, pl. 39. Et vide ante, 173 (a).

*BATE v. LAWRENCE. May 7.

[*405

A warrant of attorney given in Trinity vacation, 1838, to appear for the defendant "as of Trinity term last, Michaelmas term next, or any other subsequent term," and then to receive a declaration for him, &c., and thereupon to confess, &c., was held to be no authority for entering up judgment in a subsequent vacation.

Judgment was entered up on the 30th of November, 1843, upon a warrant of attorney: on the 4th of December, a *fi. fa.* issued, under which the defendant's goods were seized and sold. On the 18th of December a fiat issued against the defendant, upon an act of bankruptcy (of which the plaintiff had no notice) committed on the 28th of November: the adjudication took place on the 21st of December; and on the 3d of January, 1844, assignees were chosen. On the 16th of January the solicitors to the fiat were aware that the plaintiff's judgment was founded on a warrant of attorney: Held, that a motion made on the first day of Easter term 1844, to set aside the judgment, on the ground that it was not signed in pursuance of the authority given, was too late.

ON the 14th of July, 1838, the defendant gave a warrant of attorney, authorizing certain attorneys "to appear for him in the court of Common Pleas, as of Trinity term last, Michaelmas term next, or any other subsequent term, and then and there to receive a declaration for him in an action of debt, for the sum of 1600*l.* at the suit of Thomas Bate, his executors or administrators; and thereupon to confess the same action, or else to suffer a judgment by *nil dicit*, or otherwise, to pass against him in the same action, and to be thereupon forthwith entered up against him of record of the said court, for the said sum of 1600*l.*, besides costs of suit," &c.; with a defeasance on the payment of 800*l.* and interest, on the 14th of January, 1839.

On the 30th of November, 1843, the plaintiff entered up judgment, under an order of ERSKINE, J., dated the 28th.

On the 4th of December, he issued a *fi. fa.*, under which the defendant's goods were seized on the 6th, and conveyed to the plaintiff by bill of sale; such judgment not being signed "as of Trinity term 1838, or as of any subsequent term," but being signed as and of the said 30th of November, 1843.

*On the 18th of December, 1843, a fiat issued against the defendant, under which he was adjudged a bankrupt on the 21st of December, upon an act of bankruptcy committed on the 28th of November. [*406

On the 3d of January, 1844, Sir Felix Booth was chosen creditors' assignee.

The circumstances under which the judgment was signed only became known to the assignees, or to the solicitors to the fiat, from the examination

of the bankrupt *on the 3d of February, 1844*, and which examination was not obtained by them from Birmingham, where such examination took place, until the 19th of February.

Channell, Serjt., on the part of the assignees, on the first day of this term, upon an affidavit of these facts, moved for a rule calling on the plaintiff to show cause why the judgment, and the writ of execution issued thereon, should not be set aside for irregularity, with costs. Where a warrant of attorney authorizes the signing of a judgment *as of* a given or any other subsequent term, a judgment signed in vacation is a nullity. *Cobbold v. Chilver*, ante, Vol. IV. p. 62, 4 Scott, N. R. 678, 1 Dowl. N. S. 726; *Coulson v. Clutterbuck*, 2 Dowl. N. S. 391; *Rayment v. Smith*, 1 Dowl. & Lowndes, 166. A rule nisi having been granted,

Sir *T. Wilde*, Serjt., showed cause, upon affidavits negating notice of the act of bankruptcy, and showing that the assignees' attorneys had the means of knowing all the circumstances under which the judgment was signed and execution issued, on the 16th of January, 1844, on which day they wrote to the under-sheriff of Warwickshire as follows:—"Our client, Sir Felix Booth, has been appointed assignee to the estate of John Lawrence *407] of Birmingham; and, having yesterday received a copy of the proceedings, we lose no time in making this communication. It appears that an act of bankruptcy, and whereon the commissioner has adjudicated, was committed on the 28th of November, and that on a *subsequent* day you levied on the bankrupt's effects at the suit of Mr. Bate for a large sum. Mr. Bate's *judgment*, as you are doubtless aware, is *founded on a warrant of attorney*, and consequently the execution, being subsequent to the act of bankruptcy, is clearly void as against the assignees, and the sheriff is liable to them in trover for the value of the goods seized. We, therefore, on behalf of the assignees, require the re-delivery of the effects improperly seized, and will thank you to inform us, at your early convenience, whether this claim of our clients will be recognised or disputed."

Antecedently to the rule of H. T. 4 W. 4, r. 3, every judgment signed as of a term, had relation to the first day of the term. It is material to ascertain what that rule really effected. It directs that "all judgments shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day." The object was, not to produce the incongruity of a judgment pronounced when the court was not sitting, or to effect any alteration in the form of the record, but to prevent a judgment from operating as a lien, except from the day on which it was signed. Before the rule, the judgment operated as a lien on the debtor's property from the time of docketting. It now only operates as a lien from the day of signing. The warrant of attorney is to be construed according to the intention. Here, the parties used the words, "as of Trinity term last, Michaelmas term next, or any other subsequent term," in the sense in which the same words have been used (as in the case

of a docketed judgment) for more than a century. If it is *con- [*408
 tended that there was no authority to sign a judgment in vacation,
 it should be shown either that the parties did not so intend, or that their in-
 'ention is controlled by some technical rule. The words were clearly used
 for the same purpose for which they have always been inserted,—that of
 enabling the plaintiff to sign judgment in vacation: and there is no reason
 why effect should not still be given to them. This part of the warrant of
 attorney is merely formal: the substance of the arrangement is, that, in de-
 fault of payment on the appointed day, the plaintiff may issue execution.
 [TINDAL, C. J. The judgment might have been entered up in Michaelmas
 term, 1838, or in any subsequent term.] A judgment signed *as of a term*,
 would be quite as objectionable as one signed *in vacation*. Signing judgment
 “as of a term” is a well-known phrase, importing a judgment signed *gene-
 rally* as of a term; which would be as irreconcilable with the rule of court,
 as applied to this warrant of attorney, as if the judgment was signed in va-
 cation. The plaintiff has done nothing that is irregular or objectionable.
 Being authorized by the defendant to sign judgment “as of Trinity term
 last, Michaelmas term next, or any other subsequent term,” he takes the
 warrant of attorney to the master’s office, and the proper officer, recording
 the judgment pronounced by the court, makes the entry in a book with a
 general title of the term and the day on which the entry is made. That en-
 try contains nothing that is inconsistent with the authority given by this
 warrant of attorney. In the cases cited, when the present rule was moved
 for, the attention of the court does not appear to have been called to the fact
 that the words of the instrument expressly authorized the signing of a judg-
 ment in a manner *not warranted*. The universal practice was to sign judg-
 ment in vacation as of the preceding term. The new rules do not give a
 new construction to the old words used in this instrument. *Their [*409
 object was merely to destroy the effect of the relation. The present
 warrant of attorney runs thus:—“to appear for him in the Court of Com-
 mon Pleas, as of Trinity term last, Michaelmas term next, or any other sub-
 sequent term.” That relates to appearance only. The affidavit upon which
 the rule was obtained, is silent as to the time when the appearance was entered
 for the defendant in this case. The whole of this part of the instrument is
 pure form. The object of the parties is, that in case of a non-payment at the
 appointed time, the plaintiff shall be at liberty to sign judgment and issue
 execution. That which is intended solely for the benefit of one party, ought
 not to be construed as if it had been inserted for the benefit of the other. A
 warrant of attorney, like a policy of insurance, is to be construed according
 to the intention, rather than by the precise words used. The language of
 a judgment upon a warrant of attorney is the same as that of judgment
 signed in an action. A judgment, when signed in vacation, is necessarily a
 judgment of the preceding term when the court was sitting. But a judg-
 ment signed in term would be as much open to objection as one signed in
 vacation. The authority, taken literally, is to sign judgment as of a term

generally ; whereas the rule requires that it shall be signed as of a particular day. [CRESSWELL, J. The words of the rule are rather stringent against you. The judgment must now be of a particular day.] That must be understood of a time when the court is sitting, and is competent to pronounce judgment. Thus a writ, issued in vacation, is tested of the last day of term. This is for the purpose of avoiding the incongruity which would arise from the awarding of process upon a day when the court is not sitting. In the case of a judgment issued in vacation, a rule is now obtained for that purpose. [Master. The term is stated at the foot of the rule.] If there had *410] been any *irregularity in signing the judgment in this case, such irregularity would have been cured by the general authority to release errors contained in the latter part of the warrant of attorney ; by which, in the usual form, the attorneys to whom it is addressed are expressly authorized, “ after the said judgment shall be entered up as aforesaid for the defendant, and in his name, and as his act and deed, to sign and execute a good and sufficient release in the law to the plaintiff, his heirs, executors, and administrators, of all and all manner of error and errors, and all benefit and advantage thereof, and all misprisions of error and errors, defects, and imperfections whatsoever, had, made, committed, done, or suffered in, about, touching, or concerning the aforesaid judgment, or in, about, touching, or concerning any writ, warrant, process, declaration, plea, entry, or other proceedings of or any way concerning the same.” Where a bankrupt, having obtained his certificate, would be entitled to be discharged if rendered by his bail, the court, in order to avoid the circuitry of a render and a discharge, direct an exoneration to be entered on the bail-piece. So, where there is matter remediable by *audita querelâ*, the court will relieve, in a summary manner, upon motion. Here, a power is given to any of the attorneys, to whom the warrant of attorney is directed, to execute a release of errors. The question is, not whether the rule of court has been violated, but whether compliance with the rule is inconsistent with the power given. The plaintiff is not answerable for the entry in the book. The entry could be in no other form. At present there is nothing before the court, but an entry in the memorandum-book of the officer of the court ; that entry contains all that is required, and it is not inconsistent with the power given by the warrant of attorney. It has always been the practice, as well before *411] the new rules as since, to note in the *book the day on which judgment is signed ; but, in making up the roll before the new rules, judgment would have been entered up as of the term, with a memorandum in the margin, denoting the day on which judgment was signed. Now, there would be a heading as of the term. Did the parties mean to give an effect to the warrant of attorney different from that which the same words had always been understood to convey ? [TINDAL, C. J. It is certainly a contradiction.]

The defendant and his assignees are precluded from taking this objection. The plaintiff has a decisive answer to the present application. What has

the plaintiff done that is irregular? The objection is founded upon a fallacy. [CRESSWELL, J. The application on the part of the defendant is also wrong in point of form. It should have been, to rescind Mr. J. ERSKINE's order; which order has been pursued in entering up the judgment. Who ever heard of a warrant of attorney in which the plaintiff was restricted from entering up judgment in vacation?] In *Weedon v. Garcia*, 2 Dowl. N. S. 64, judgment was irregularly signed, and execution levied; on the 9th of March. A fiat in bankruptcy was awarded against the defendant on the 22d of March, and assignees were chosen on the 7th of April. It was held too late to apply to set aside the judgment on the 28th of April following, either at the instance of the defendant himself, or of his assignees. That case cannot be distinguished from the present. The order of Mr. J. ERSKINE, of the 28th of November, established the judgment. A motion ought to have been made to set aside that order. What is the excuse made for not coming to the court during Hilary term? On the 16th of January, the solicitors to the fiat and to the assignees write the letter set out in the affidavit, which shows that, at that time, they well knew that the *judgment was upon a warrant of attorney. Yet no search is made until the 3d of February. Whose fault was that? [*412]

The court are called upon to put a construction upon the warrant of attorney, directly contrary to the intention of the parties. The application is made out of time; and the judgment now sought to be set aside is a judgment signed under a judge's order, which stands unimpeached. For these reasons it is submitted that the present rule should be discharged.

Channell, Serjt., in support of his rule. There was no ground for moving to set aside the order of Mr. J. ERSKINE, which was perfectly regular. The judgment is as clearly irregular; the plaintiff having failed to pursue the authority given by the warrant of attorney. In *Cobbold v. Chilver*, a warrant of attorney, in the same form as the present, given in Hilary vacation, 1840, authorized the confession of a judgment "as of last Hilary term, next Easter term, or any subsequent term;" and it was held that a judgment entered up in Trinity vacation, 1841, was not a due execution of the authority. That case was acted upon by PATTESON, J., in *Coulson v. Clutterbuck*, which is perhaps not an important confirmation; but it was distinctly recognised in *Rayment v. Smith*. In that case a warrant of attorney, given in Trinity vacation, 1841, authorized certain persons to appear for the defendant "as of Trinity term now last, Michaelmas term now next, or some other subsequent term, then and there to receive a declaration in an action of debt, and thereupon to confess the same action, or else to suffer a judgment by *nil dicit* or otherwise to pass against him in the same action, and to be *thereupon forthwith* entered up against him of record;" a judgment entered up in Hilary vacation, 1843, was set aside for irregularity. [CRESSWELL, J. In that case, *the court, looking at the general scope of the new rules, were of opinion that judgment might be entered in vacation. But it was afterwards decided the other way in *Bird v. Manning* [*413]

13 Law J., N. S., Q. B. 123. There a judgment entered up on the 4th of January, 1844, "as of Michaelmas term, 7 Victoria," on a warrant of attorney given by a party in 1835, to appear as of last Hilary term, next Easter term, or any subsequent term, and then and there to receive a declaration, and thereupon to confess, &c., was held bad.] The court would not presume that the appearance, and the receipt of the declaration, had been in term.

With respect to the alleged laches, it is a sufficient answer that this is not an irregularity which can be waived, but is an absolute nullity. [CRESSWELL, J. An irregularity is a violation of some rule of practice; here, the matter alleged is, an acting without authority.] In *Webber v. Hutchins*, 8 M. & W. 319, 1 Dowl. N. S. 95, it was held that a *fi. fa.*, directing the sheriff to levy a sum smaller than that mentioned in the judgment, is irregular, unless the reason of the variance be shown on the face of the writ: and the court would not amend the writ where the rights of third persons had intervened. [TINDAL, C. J. If the judgment be a nullity, you do not want us to set it aside: (a) and you cannot call it error; for if you bring a writ of error, you will be met by a release of errors.] As to the supposed laches, this rule was moved for on the first day of Easter term, and the assignees had no knowledge of the terms of the warrant of attorney, until *414] the preceding vacation. [CRESSWELL, J. *My brother *Wilde* says, that you had notice that the judgment was upon a warrant of attorney. *Esdaile v. Davis*, 6 Dowl. P. C. 465, is an authority against you upon that ground. Suppose the motion to set aside the warrant of attorney had been made by the defendant, it could not have been contended that the application would not have come too late *from him*.] It would be inconvenient to bind assignees so strictly. They are merely the official representatives of the bankrupt, and may be persons having no interest in the estate of the bankrupt. It is not pretended that any inconvenience has resulted to the plaintiff from the delay.

TINDAL, C. J. If it had been necessary to decide this case with reference to *Cobbold v. Chilver* and *Rayment v. Smith*, I should have found it difficult to distinguish them. But it appears to me that the parties making this application were bound to come to the court with due diligence, so as not to interfere with the rights of others. The interests of a third person are not to be prejudiced by their delay. I agree that the plaintiff might not be in a situation to sign a regular judgment; but he might be put to great inconvenience by the delay which has occurred. Under the levy, which took place on the 6th of December, 1843, the plaintiff received a large sum of money, which he was not called upon to refund until the 15th of April, 1844. In the mean time, he may have spent or transferred it, concluding it to be his own; and other cases of inconvenience might be put. The

(a) If there had been no warrant of attorney or other proceeding, a judgment *de facto* would not have been a nullity, still less would the writ of *fi. fa.* awarded and executed upon that judgment. If either were a nullity in point of law, it might be important to the parties that the void judgment, or void award of execution, should not appear on the records of the court.

present application seems to fall within the principle acted upon by the court of King's Bench in *Skyring v. Greenwood*, 4 B. & C. 281, 6 D. & R. 401, and *Shaw v. Picton*, 4 B. & C. 715, 7 D. & R. 201. In *Skyring v. Greenwood*, an officer having been allowed to *draw upon the credit of certain allowances to which it was supposed he was entitled, the paymaster, who had omitted to state that these allowances were disallowed by the board of ordnance, was not suffered to debit the officer with those deductions. So, in the present case, where the levy is made on the 6th of December, and no application is made to the court till the 15th of April, the objection taken is, not that any fraud has been practised, but that there has been a violation of a technical rule of practice. It cannot be doubted but that if the parties had been asked at the time the warrant of attorney was given, what their intention was, the answer would have been that execution should issue upon default in payment at the stipulated time. The warrant of attorney was probably framed for the express purpose of enabling the plaintiff to sign judgment out of term. Let us see how much time has been allowed to elapse. The levy took place on the 6th of December. The defendant, who must have known all the circumstances under which he was deprived of his goods, did not become bankrupt until the 18th of December; and he might have applied to a judge at chambers to set aside the judgment and execution. I am not prepared to say that his omission to do this did not deprive him of the right to the interposition of the court; and, if so, those who claim under him ought not to be in a better situation. Suppose, however, a reasonable time to be allowed from the 3d of January, 1844, when a creditor's assignee was chosen. It appears that on the 16th of January some inquiry had been made; for the correspondence between the solicitors under the fiat and the plaintiff shows that they then knew that the judgment was on a warrant of attorney. There were still fifteen days of Hilary term left, during which they might have ascertained whether or not the judgment had been properly signed; and they might have gone before a *judge at chambers in Hilary vacation. *Weedon v. Garcia* [*416] appears to me to be a much stronger case than the present. There, judgment was irregularly signed, and execution levied, on the 9th of March; and it was held too late to apply to set aside the judgment on the 28th of April following, either at the instance of the defendant, or at that of his assignees, (he having subsequently become bankrupt,) although the assignees were not aware of the irregularity until the 7th of April. So, in this case, I think that justice requires that the rule should be discharged.

COLTMAN, J. The objection taken is *strictissimi juris*. By giving effect to it we should be defeating the real intention of the parties. Though probably we should have felt ourselves compelled to act upon the cases that have been cited,—and which I think were decided correctly,—had the application been made sooner, we are justified in looking at the time at which the application is made, and holding the assignees to a strict conformity with the rules which have been laid down with respect to the period

at which parties ought to come to the court. I agree in opinion with the Lord Chief Justice in the present case, that there has not been that degree of promptness in taking advantage of the irregularity, which the practice of the court requires.

ERSKINE, J., was absent.

CRESSWELL, J. I am of the same opinion. It appears to me that the objection taken in this case is very like an objection that judgment has been signed at an improper time; and that is an irregularity. The judgment was not signed at an earlier period than that at which the plaintiff was entitled to sign it, but it was signed at a time at which he was not strictly *417] authorized *by the defendant to sign it. In an adverse suit the authority to sign judgment is derived, not from the party, but from the record. If the plaintiff signs it at a time when, according to the authority given, he is not entitled to do so, he is guilty of an irregularity; but, to take advantage of that irregularity, the other party must use a proper degree of speed. This rule has been long recognised; as in *Skyring v. Greenwood*, where the plaintiff had been authorized to draw upon the defendant in anticipation of certain allowances to which the defendant gave the plaintiff reason to believe that he was entitled. The principle is also sanctioned by numerous subsequent cases. Here, a considerable period has been suffered to elapse: and we know not what has become of the money, or what engagements the plaintiff may have entered into upon the faith of his being legally entitled to the sum which he had received. It would be not only a great hardship, but gross injustice, to compel him now to refund.

Rule discharged with costs.(a)

(a) Vide *Brooks v. Hudson*, Trinity term, post.

FRANCES STROUD v. JOSEPH STROUD, Executor of MARTHA MAIN, deceased. May 8.

Where a party entitled to a legacy under a will has a claim against a testator, which he conceals from the executor until after he has received the legacy, he cannot afterwards, in an action against the executor, object that the amount of the legacy was not paid in a due course of administration.

DEBT, for wages as a domestic servant alleged to have been due from the deceased at the time of her death, and upon an account stated.

*418] The defendant pleaded, first, that the testatrix was *never indebted; secondly, payment by the defendant as executor; thirdly, *plene administravit*.

At the trial of the cause in the sheriff's court, London, on the 9th of March last, it appeared that, about September, 1840, the plaintiff went to live with the testatrix, who was her aunt, as a servant: but there was no proof of any agreement as to wages. The plaintiff remained with the testatrix until her death, which occurred in March, 1843. The testatrix by

her will left the plaintiff a legacy of 20*l.*, which was paid in the following October. Upon receiving the legacy the plaintiff demanded 16*l.* due to her for wages. It appeared that all the testatrix's money had been exhausted in payment of debts, legacies, and funeral expenses. It was shown however that the testatrix had some plate and household furniture, which the executor allowed the testatrix's son to take; but no proof was given of the value of these articles.

For the defendant, it was contended that the plaintiff went to live with her aunt, upon an understanding that she was not to receive any wages; and that the demand for wages not being made until after the legacy was paid, such a demand was a fraud upon the executor. Williams on Executors, part 3, book 3, chap. 2, sect. 8, vol. ii. p. 1025, was also cited to show that the payment of the legacy was, at any rate, a satisfaction of the debt.

The under-sheriff left it to the jury to say whether the plaintiff went to live with the deceased as a servant for wages, or in the character of a poor relation, performing service, in expectation of ultimately receiving some benefit from her aunt; if the latter, they were told to find for the defendant; if the former, then they were directed to find the first issue for the plaintiff, with such damages as they thought her entitled to. *They were [419 also further told, that if they were of opinion that the relation of mistress and servant really subsisted between the parties, they were not to consider the payment of the legacy as a satisfaction of the demand for wages.

The jury having returned a verdict for the plaintiff, damages 11*l.* 2*s.*,

Channell, Serjt., on the part of the defendant, on a former day in this term, moved for a rule nisi for a new trial, upon the ground of misdirection, and that the verdict was against the evidence, citing *Richards v. Browne*, 3 New Cases, 493, 4 Scott, 262. The rule was refused on the former, but granted upon the latter ground.

Sir T. Wilde, Serjt., now showed cause. The jury found that the plaintiff had served her aunt on a contract for wages; and there was abundant evidence to justify them in coming to that conclusion. On moving for this rule, it was insisted on the part of the defendant that he was entitled to avail himself of the payment of the 20*l.*, either under the plea of payment, or that of *plene administravit*. [Gresswell, J. It was put thus:—either it was paid for wages, or if paid in respect of the legacy, it was paid before notice of there being any demand for wages; and it exhausted the assets.] The money was clearly paid as a legacy, and after having been specifically paid on one account, it cannot afterwards be said to have been paid on another. Although the rule in a court of equity is, that a legacy is to be considered as a satisfaction of a debt, legacies to servants seem to be looked upon almost as an exception. In *Richardson v. Greese*, 3 Atk. 65, Lord Lardwicke, whilst he *admits the general rule of redemption, [420vinces anxiety to avoid giving effect to it, and shows that “legacies to servants have never been held to be in satisfaction of debts.” So,

in *Hinchcliffe v. Hinchcliffe*, 3 Ves. jun. 529, Lord ALVANLEY says: "Any little circumstances are laid hold of by the court to take it out of the rule." A court of equity would examine the wording of the will to ascertain whether the legacy was meant to be a satisfaction of the wages; and a court of law will not, in the absence of the will, hold the legacy to be a redemption of the debt, when, for all that appears, the will may contain a declaration that the legacy shall not be in satisfaction of the wages. The jury have also, upon competent evidence, negatived the plea of *plene administravit*. With respect to that plea, it appeared at the trial, that, although there was no money remaining, plate and furniture had been handed over to the testatrix's son. The case of *Richards v. Browne*, 3 New Cases, 493, 4 Scott, 262, is not in point: for there the executor was misled by misrepresentations made by the creditor. Here, the plaintiff has been guilty of no misrepresentation; and she is chargeable with no laches; for laches is an omission to do something which a party is bound by law to do; but here, the plaintiff was not bound to make a demand of her wages, before she received the legacy.

Channell, Serjt., in support of his rule. The great body of the evidence was clearly in favour of the defendant. It may be admitted that the courts will lay hold of slight circumstances to take a case out of the general rule that a legacy is a satisfaction of a debt. But, although that is the rule, it is said in *Williams on Executors*, 3d edit., 1025, that "It is a rule *421] established in the courts of equity, that, where a debtor bequeaths to his creditor a legacy equal to, or exceeding, the amount of his debt, it shall be presumed, in the absence of any intimation of a contrary intention, that the legacy was meant by the testator as a satisfaction of the debt." Here, there is nothing to show a contrary intention, and the jury ought to have been told that they were bound to presume that the testatrix must have intended the legacy to her niece to be in satisfaction of her wages, if any were due to her. The executor was clearly misled by the studious concealment, by the plaintiff, of her claim for wages, until after the legacy had been paid: and the executor is entitled to have the 20*l.* allowed in one shape or another.

TINDAL, C. J. With respect to the first part of the case I entertain no doubt but that it ought to rest where it is on the finding of the jury, on the point whether the services rendered to the deceased were for wages, or in expectation of a legacy. With regard to the question arising on the plea of *plene administravit*, which I think has not been properly sifted, it seems to me that the case ought to go down to a new trial. The defendant however must admit, that the plaintiff served her aunt upon a contract for wages, and that such wages amounted to the sum awarded by the jury. I think the rule should be made absolute on payment of costs.

COLTMAN, J. It seems to me that the plaintiff, having received the legacy, cannot afterwards be allowed to say that the amount was not paid in due administration of the assets of the testatrix.

CRESSWELL, J. The proper course will be to enter a verdict for the plaintiff on the first issue with 11*l.* 2*s.* damages, and for the plaintiff on the second issue; and *that on payment of costs, there be a new trial [*422 on the last issue, the plaintiff admitting that the 20*l.* were paid in a due course of administration. Rule absolute accordingly.

WATSON and Another v. COLEMAN. May 8.

The plaintiffs sued for 19*l.* 8*s.*; the defendant took out a summons to stay proceedings on payment of 4*l.* 18*s.* and costs, which the plaintiffs declined to accept, claiming to be entitled to more; the 4*l.* 18*s.* were afterwards paid into court, and ultimately taken out by the plaintiffs, and a *nol. pros.* entered as to the residue: Held, that the defendant was not entitled to the costs of the proceedings subsequent to the tender, it being sworn, on the part of the plaintiffs, that the larger sum claimed was actually due to them, but that they had declined to proceed with the action from motives of prudence.

THE writ of summons in this cause was issued on the 18th of January, 1844, and served on the 20th. By an endorsement thereon, the plaintiff claimed 19*l.* 8*s.* for debt, and 2*l.* 5*s.* for costs. On the 22d, the defendant took out a summons calling on the plaintiffs' attorney to show cause why, on payment of 4*l.* 18*s.*, and costs, to be taxed, the proceedings should not be stayed. This summons was attended before COLTMAN, J., who endorsed it—"No order; plaintiffs claiming more." The plaintiffs having declared on the 29th of January, the defendant pleaded—first, except as to 4*l.* 18*s.*, never indebted—secondly, as to 15*l.*, parcel, &c., payment before action brought—thirdly, as to 4*l.* 18*s.*, payment into court. The plaintiffs afterwards took the 4*l.* 18*s.* out of court, and entered a *nolle prosequi* as to the rest.

On taxation before the master he disallowed the *plaintiffs'* costs incurred subsequently to the service of the summons of the 22d of January. The *defendant* claimed to be entitled to costs incurred subsequently to the hearing of the summons, which the master refused to allow, except with regard to the pleas to which the plaintiffs had entered a *nolle prosequi*.

*Dowling, Serjt., on a former day in this term, obtained a rule [*423 calling upon the plaintiffs to show cause why the master should not review his taxation of the defendant's costs; "or why the said master should not be at liberty to tax the defendant's costs incurred in this cause subsequently to the 22d of January last; and why such costs, when ascertained and taxed as aforesaid, should not be paid by the plaintiffs to the defendant or his attorney; or why the balance of such last-mentioned costs, after deducting the plaintiffs' costs already taxed, should not be in like manner paid by the plaintiffs," &c., with costs.

Shee, Serjt., showed cause on an affidavit which stated that the plaintiffs had furnished goods to the defendant to the amount of 19*l.* 8*s.*, but that they were advised to forego all but the sum paid into court, the defendant having compounded with his creditors, and the plaintiffs having applied

without success to the defendant's attorneys to ascertain the ground of his defence as to the 14*l.* 10*s.*, and having reason to apprehend that their late traveller, who had been dismissed from his employment, and who was the only witness to prove that the credit for the goods had expired at the time of action brought, was colluding with the defendant. The affidavit upon which the rule was moved nowhere distinctly states that the defendant was not indebted to the plaintiffs in a greater sum than 4*l.* 18*s.* at the time the action was brought. [CRESSWELL, J. Have you not, by taking the money, admitted that nothing more was due?] The taking of the money is merely *prima facie* evidence that nothing more was due; but the presumption so raised may be rebutted. Here, it is shown that a much larger sum was in reality due to the plaintiffs, and that the plaintiffs merely accepted the sum tendered from motives of prudence. The onus is, therefore, thrown on the *424] defendant, to make out that the plaintiffs' conduct was *oppressive and vexatious; *Edwards v. Harrison*, 11 Price, 533; *Hale v. Baker*, 2 Dowl. P. C. 125, and *Gower v. Elkins*, 6 Dowl. P. C. 335; which are authorities to show that the defendant, under circumstances like the present, is only entitled to costs where the proceedings on the part of the plaintiff can be so regarded. That has not been done here; and it is submitted that the application has been fully answered.

Channell, Serjt., in support of the rule. Having taken the 4*l.* 18*s.* out of court, and entered a *nolle prosequi* as to the rest of their demand, it must be taken that the plaintiffs originally made a claim which they were unable to substantiate. If they omitted, before bringing their action to inquire of their late traveller, they must take the consequences of their neglect. *Gower v. Elkins*, when properly examined, is in favour of the defendant. It is not necessary for the defendant to prove malice on the part of the plaintiffs. It is sufficient, if by their conduct they have put the defendant to a needless expense; which is what the courts understand by the terms vexatious and oppressive. Under the circumstances, the defendant is clearly entitled to his costs incurred subsequently to the making of the original tender.

TINDAL, C. J. The question in this case is, whether or not the defendant is entitled to his costs between the time of the tender before the judge and the entry of the *nolle prosequi*. I agree that the general rule is, that, where a plaintiff, after a tender of a sum which he refuses to accept, goes on, and he recovers no more than the sum tendered, he shall pay the defendant the costs subsequently incurred. It is however open to the plaintiff to show that he acted, not oppressively and vexatiously, but under *425] mistake; or that he had reasonable grounds *for the course he adopted. I cannot see any thing oppressive or vexatious in the conduct of the plaintiffs. They swear that the 19*l.* 8*s.* claimed was justly due to them; that they applied to the defendant's attorneys to learn the ground of their defence as to the 14*l.* 10*s.*, but that they obstinately refused to give any information. They afterwards discovered that the defendant was in communication with their discarded servant, whom they must have

produced, as their only witness, to prove the terms of the order; and thereupon, from motives of prudence, they determine to abandon their demand for the full amount. Under these circumstances, the plaintiffs could hardly be expected to proceed with the action; and it seems to me that this case is not to be governed by the general rule.

COLTMAN, J. I think the defendant ought to have acted with more candour.
Rule discharged with costs.(a)

(a) Cresswell, J., had gone to chambers.

RAMME v. DUNCOMBE. May 8.

On the 28th of April, a notice of declaration and demand of plea was served; on the 8th of May the defendant moved to set aside the notice, on the ground that it did not state within how many days the defendant was to plead: *Held*,—the plaintiff having signed judgment in the mean time,—that the application was too late.

DOWLING, Serjt., moved to set aside the notice of declaration served in this cause, and the interlocutory judgment, subsequently signed for want of a plea, on the ground of irregularity. The irregularity was, that the notice required the defendant to plead within —— days. [CRESSWELL, J. When were you *served with the notice?] On the 20th of April. [CRESSWELL, J. You have kept quiet till now. You knew at the time it was irregular.] Until judgment was signed, and the defendant received notice that a writ of inquiry was about to be executed, he did not know that the plaintiff intended to act on the notice. [TINDAL, C. J. The defendant ought to have come to the court at once.] He would have been met with the observation that he need not come, *quia timet*. [TINDAL, C. J. I think this is a case in which he *might* have come, *quia timet*.]

Per Curiam;

Rule refused.

COPLEY and Another v. MEDEIROS. May 8.

A bail-bond given upon an arrest on a writ of capias issued under the 1 & 2 Vict. c. 110, s. 3, was set aside for a variance between such writ and the paper served on the defendant as a copy of the writ.

A JUDGE's order for holding the defendant to bail having been granted under the 1 & 2 Vict. c. 110, s. 3, a writ of capias issued on the 19th of April last, against the defendant, who was arrested thereon, and gave bail to the sheriff on the 20th. On the 24th a summons was taken out for delivering up the bail-bond to be cancelled for irregularity, with costs, on the ground that the words "on promises" were omitted in the copy of the writ of capias delivered to the defendant upon his being arrested, and that in that and in other respects, it was not a true copy of the original writ of capias, and that no true copy of the said writ had been served upon the de-

fendant. This summons not being attended, a second was taken out on the following day, which was dismissed *with costs*, by MAULE, J., on the 26th

*427] Sir T. Wilde, Serjt., on a former day in this term, obtained a rule to show cause why the copy of the writ of *capias* and the service thereof should not be set aside, and why the bail-bond should not be delivered up to be cancelled, on the ground of the variance between the writ and the copy delivered, and also why so much of the order as directed the defendant to pay the costs of the summons should not be rescinded. The want of an exact copy is a fatal objection. *Smith v. Pennell*, 2 Dowl. P. C. 654.

Channell, Serjt., now showed cause. The form of the action is described in the writ of summons, in the writ of *capias*, and in the bail-bond: the objection is, that the copy delivered to the defendant omits the words "on promises," that is, omits accurately to describe the cause of action. The writ of *capias* in this case issued under the abolition of arrest act, not under the 2 W. 4, c. 39, s. 4, under which the defendant would have been entitled to the relief he seeks. By that section, the plaintiff is required to make copies, and deliver them to the sheriff. But the 1 & 2 Vict. c. 110, ss. 3, 4, contains no such directions. The *capias* is not the commencement of the action; that, in all cases, must be commenced by writ of summons. [CRESSWELL, J. The *capias* should identify itself with the writ of summons, the process by which the action was commenced, and it should be so served as to inform the defendant what he is to do. TINDAL, C. J. The writ itself requires the sheriff to deliver a copy thereof to the defendant. If the copy be made by the officer, he is to be considered as the agent of the plaintiff.] The decisions under the 1 & 2 Vict. c. 110, are not so

*428] stringent as those under the former act. In *Plock v. Pacheco*, 9 M. & W. 342, 1 Dowl. N. S. 381, a judge made an order for the arrest of the defendant for 422*l.*: the *capias* was endorsed for 422*l.* 13*s.* 4*d.*, the real amount of the debt: and the court refused to discharge the defendant out of custody, and directed the writ to be amended, on payment by the plaintiff of the costs of the application for the defendant's discharge. (a) Considerable importance is there attached to the 6th section of the statute, which enacts, "that it shall be lawful for any person arrested upon any such writ of *capias*, to apply at any time after such arrest to a judge of one of the superior courts at Westminster, or to the court in which the action shall have been commenced, for an order, or rule, on the plaintiff in such action, to show cause why the person arrested should not be discharged out of custody; and that it shall be lawful for such judge or court to make absolute or discharge such order or rule, and to direct the costs of the application to be paid by either party, or to make such other order therein as to such judge or court shall seem meet," &c. In *Richards v. Dispraile*, 9 M. & W. 459, 1 Dowl. N. S. 384, the affidavit, made in support of an application for a *capias*, described the plaintiff as "J. R., one of the

(a) In the principal case an application had been made to amend the copy.

public officers of the Western District Banking Company *for Devon and Cornwall*:" in the writ these last words were omitted: and the court discharged, without costs, a rule for discharging the defendant out of custody on the ground of the variance, upon the plaintiff's filing a fresh affidavit omitting those words in the title. *Plock v. Pacheco* was also recognised and acted upon in the Exchequer in *Bilton v. Clapperton*, 9 M. & W. 473, 1 Dowl. N. S. 386.

*Sir T. Wilde, Serjt., in support of his rule. The uniformity of process act, 2 W. 4, c. 39, regulates the arrest in all respects, except so far as it is altered by the 1 & 2 Vict. c. 110. By the fourth section of the former act, it is required that the plaintiff shall make and deliver to the sheriff, or other officer having the execution and return of the *capias*, so many copies thereof as there may be persons intended to be arrested thereon, or served therewith. The effect of the earlier clauses of the 1 & 2 Vict. c. 110, is, to abolish the power of arrest upon mesne process, except in certain cases. The third section was framed with reference to the uniformity of process act, 2 W. 4, c. 39, and, especially, to that clause of it which requires copies to be made by the plaintiff and delivered to the sheriff. No duty is, by either act, imposed on the sheriff or other officer, except that of delivering, to the parties arrested, such copies of the process as he shall be furnished with by the plaintiff. If the officer makes the copies, he is, for that purpose, the agent of the plaintiff. The bail-bond, it is true, probably describes the form of action: but the defect is not cured by a recital in the bail-bond. [*429]

TINDAL, C. J. The fourth section of the uniformity of process act, 2 W. 4, c. 39, by which the plaintiff is required to make and deliver to the sheriff, or other officer having the execution and return thereof, so many copies of the process as there may be persons to be arrested thereon or served therewith, still remains in force. The officer is to deliver to the party arrested or served, the copy which the plaintiff has made. Where the plaintiff allows the bailiff to prepare the copy, he makes the bailiff his agent, and must take his act for better or for worse. *That which in this case was served upon the defendant as a copy of the *capias*, being insufficient, I think the rule must be made absolute. [*430]

Per curiam ;

Rule absolute, without costs. (a)

(a) Vide *Yeates v. Chapman*, 3 N. C. 262, 3 Scott, 648

END OF EASTER TERM.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
IN
Trinity Term,
IN THE SEVENTH YEAR OF THE REIGN OF VICTORIA.

The judges who sat in banco during this term were,

TINDAL, C. J.
COLTMAN, J.

CRESSWELL, J.
ERLE, J.

REGULA GENERALIS.

DIRECTIONS TO THE TAXING OFFICERS, IN LIEU OF THE DIRECTIONS OF HILARY VACATION, 4 W. 4, 1834, SO FAR AS THE SAME RELATE TO THE SCALE OF COSTS IN CASES WHERE THE SUM RECOVERED, &c. DOES NOT EXCEED 20*l*.

THAT, in all actions of assumpsit, debt, or covenant, where the sum recovered, or paid into court and accepted by the plaintiff in satisfaction of his demand, or agreed to be paid on the settlement of the action, shall not exceed 20*l*., without costs, the costs both of the plaintiff and defendant,^(a) *432] and as well between *attorney and client as party and party, except as hereinafter excepted, shall be taxed according to the reduced scale hereunto annexed.

Provided, that in case of trial before a judge in one of the superior courts or judge of assize, if the judge shall certify, on the *postea*, that the cause was proper to be tried before him, and not before a sheriff or judge of an inferior court, the costs shall be taxed upon the *usual scale*.

Where, in like actions, the sum endorsed on the summons shall be more than 20*l*., but the plaintiff fails to recover more than that sum, and the judge

(a) Vide *Richardson v. Kennet*, antè, Vol. VI. 712.

does not certify as aforesaid, the plaintiff's costs, as well between party and party, as also between attorney and client, shall be taxed as upon a writ of trial before a judge of a court of record where attorneys are not allowed to act as advocates, as hereinafter provided for; but the defendant's costs, if any, are to be taxed on the usual scale.

Provided also, that in cases triable before the sheriff or judge of an inferior court, where the judge shall refuse to make an order for such trial, the judge shall, if he shall think fit, direct, at the time of such refusal, on what scale the costs of each parties shall be taxed; and, in default of such direction, the costs of both parties shall be taxed on the usual scale.

GENERAL ALLOWANCE FOR PLAINTIFFS AND DEFENDANTS, AS WELL
BETWEEN ATTORNEY AND CLIENT AS BETWEEN PARTY AND PARTY,
IN ACTIONS NOT EXCEEDING 20*l*.

| | £ | s. | d. |
|--|---|----|----|
| Writing letter, where letters are usually allowed - - - | 0 | 2 | 0 |
| *433] *Instructions to sue, defend, or to draw pleadings or special affidavits, where instructions are usually allowed | 0 | 3 | 4 |
| Writ of summons - - - - - | 0 | 12 | 6 |
| Alias - - - - - | 0 | 10 | 0 |
| Pluries - - - - - | 0 | 10 | 0 |
| Endorsing costs on writs - - - - - | 0 | 2 | 0 |
| Service of writ of summons, alias, or pluries - - - - - | 0 | 5 | 0 |
| Extra-service at 6 <i>d</i> . per mile, if served out of the town in which the attorney resides, not exceeding - - - - - | 0 | 5 | 0 |
| Affidavit of service, including oath - - - - - | 0 | 5 | 0 |
| If writ sent to a correspondent, writing him with writ and instructions, and his writing in reply, 2 <i>s</i> . each - - - - - | 0 | 4 | 0 |
| Paid correspondent's charges, extra for mileage, 6 <i>d</i> . per mile, as before, not exceeding 5 <i>s</i> . - - - - - | 0 | 5 | 0 |
| Drawing and engrossing especial affidavits, per folio - - - | 0 | 1 | 0 |
| <i>Nothing for attending to be sworn.</i> | | | |
| Searches,—such as for appearance, declaration when filed, and rule to plead - - - - - | 0 | 3 | 4 |
| Attending to procure duplicate of order, office copy of any rule or affidavit, writ, judgment, or other document, when necessary | 0 | 3 | 4 |
| Entering appearance for defendant, sec. stat. - - - - - | 0 | 6 | 0 |
| Drawing pleadings, per folio - - - - - | 0 | 1 | 0 |
| Engrossing, per folio - - - - - | 0 | 0 | 4 |
| Close copy, when country agency, per folio - - - - - | 0 | 0 | 4 |
| Fee to counsel or pleader, when special - - - - - | | | |
| Attending him - - - - - | 0 | 3 | 4 |

No advising on evidence, as between party and party: but to

*434] *be allowed, as *between attorney and client, when necessary.*

| | | | |
|---|---|---|---|
| Drawing special notices to admit or produce, copy and service | 0 | 5 | 0 |
|---|---|---|---|

| | £ | s. | d. |
|---|---|----|----|
| Copy for judge - - - - - | 0 | 2 | 0 |
| <i>Extra for service, if necessarily served at a distance, or sent to a correspondent, the same as for serving writs.</i> | | | |
| Copy notice sent, served by adverse party, if agency - - | 0 | 2 | 0 |
| Notice of declaration, copy and service - - - - - | 0 | 5 | 0 |
| Short particulars to accompany - - - - - | 0 | 2 | 6 |
| <i>If notice served at a distance, or sent to a correspondent,—the same as for serving writs, &c.</i> | | | |
| Drawing long particulars and fair copy, exceeding three folios, at per folio - - - - - | 0 | 0 | 4 |
| Rule to plead - - - - - | 0 | 1 | 6 |
| Rule to reply, rejoin, &c., copy and service - - - - - | 0 | 4 | 0 |
| Demanding pleadings, residence of plaintiff, authority for issuing writ, and other common notices, copy and service - - | 0 | 3 | 0 |
| Copy and service of summonses - - - - - | 0 | 3 | 0 |
| Attending summons, or giving consent - - - - - | 0 | 3 | 4 |
| Copy and service of orders usually served - - - - - | 0 | 3 | 0 |
| When costs taxed under an order or rule, attending to get an appointment thereon - - - - - | 0 | 3 | 4 |
| Copy and service of rules - - - - - | 0 | 4 | 0 |
| Paying money into court - - - - - | 0 | 3 | 4 |
| Taking it out - - - - - | 0 | 6 | 8 |
| Replication, accepting money in full of demand - - - - | 0 | 3 | 0 |
| Close copy, when country agency - - - - - | 0 | 1 | 0 |
| Similiter, by replication, or rejoinder, or the like, where a separate pleading, and not made up with the issue - - - | 0 | 3 | 0 |
| *435] <i>*Nothing for close copy.</i> | | | |
| Drawing interlocutory, or final, judgment - - - - - | 0 | 3 | 4 |
| Attending to sign - - - - - | 0 | 3 | 4 |
| Engrossing proceedings on paper, per folio - - - - - | 0 | 0 | 4 |
| Entering on roll, per folio - - - - - | 0 | 0 | 4 |
| Plea of general issue - - - - - | 0 | 3 | 0 |
| Close copy, when country agency - - - - - | 0 | 1 | 0 |
| Close copy of common rules - - - - - | 0 | 1 | 0 |
| Ditto of orders ditto - - - - - | 0 | 1 | 0 |
| Ditto of special rules or orders, per folio - - - - - | 0 | 0 | 4 |
| Drawing abstract of pleas and fair copy, and copy for judge - | 0 | 3 | 0 |
| <i>No close copy.</i> | | | |
| Drawing issue, of whatever length - - - - - | 0 | 3 | 4 |
| Attending to pay pleading fee - - - - - | 0 | 3 | 4 |
| Notice of trial, or inquiry - - - - - | 0 | 3 | 0 |
| <i>No close copy.</i> | | | |
| <i>If served on defendant, or at a distance, or sent to a correspondent to be served, the same as serving writ, &c.</i> | | | |

| | £ | s. | d. |
|--|---|----|----|
| Engrossing writ of trial or inquiry, per folio - - - - | 0 | 0 | 4 |
| Fee thereon, <i>but no fee on drawing</i> - - - - | 0 | 3 | 4 |
| Copy particulars to annex, if short - - - - | 0 | 1 | 0 |
| If more than three folios, per folio - - - - | 0 | 0 | 4 |
| Subpœna - - - - | 0 | 5 | 0 |
| Copy and service - - - - | 0 | 3 | 0 |
| Subpœna <i>duces tecum</i> - - - - | 0 | 7 | 0 |
| Copy and service - - - - | 0 | 4 | 0 |

If either served at a distance or sent to a correspondent to serve, same extra as serving writ.

| | | | |
|---|---|----|---|
| Minutes of evidence, or instructions for brief - - - - | 0 | 13 | 4 |
| Drawing brief and <i>one fair copy</i> where cause tried before a judge of a court of record where attorneys are not allowed to act as advocates, not exceeding - - - - | 2 | 0 | 0 |
| *436] *Paid fee to counsel, (one guinea,) and clerk - - - - | 1 | 3 | 6 |
| Attending him - - - - | 0 | 3 | 4 |
| Attending to enter cause for trial - - - - | 0 | 3 | 4 |
| Attending court, on writ of trial or inquiry, in same town - - - - | 0 | 13 | 4 |
| Attending court, when cause did not come on, each day - - - - | 0 | 6 | 8 |
| When necessary, attending for, and altering, writ of trial or inquiry, and attending to re-lodge same - - - - | 0 | 3 | 4 |
| Altering and re-sealing subpœnas, whether one or more, <i>besides what is paid</i> - - - - | 0 | 3 | 4 |

Re-serving same, when done, and necessary, if at a distance, or sent to a correspondent, as before.

If the attorney attending a writ of trial has to go a distance, mileage 1s. one way.

Attorney attending trial at a distance, one guinea per day as long as necessarily detained in going to, attending and returning from the trial, if no other business; or if other business, in the whole not to exceed two guineas a day.

If more than one cause, mileage to be apportioned; if more than two other causes, no mileage.

| | | | |
|---|---|---|---|
| Attending for special rules, when not made upon motion in court - - - - | 0 | 3 | 4 |
| Affidavit of increase, including oaths - - - - | 0 | 5 | 0 |
| Copy for the opposing party - - - - | 0 | 2 | 0 |
| Bill of costs and copy, at 8d. per folio, not to exceed - - - - | 0 | 4 | 0 |
| Copy for the opposing party, 4d. per folio, not exceeding - - - - | 0 | 4 | 0 |
| Notice of taxing - - - - | 0 | 3 | 0 |
| *437] *Attending taxing - - - - | 0 | 3 | 4 |
| If long, in master's discretion - - - - | 0 | 6 | 8 |
| Instructions to counsel on common motions - - - - | 0 | 3 | 4 |
| Attending court on motion, rule nisi granted, and attending to draw up rule - - - - | 0 | 6 | 8 |

| | £ | s. | d. |
|--|---|----|----|
| Attending court each day on special motions or argument, not exceeding 20s. a term - - - - - | 0 | 3 | 4 |
| Ditto when heard - - - - - | 0 | 6 | 8 |
| Attending to settle, and drawing and fair copy cognovit, and getting some signed - - - - - | 0 | 10 | 0 |
| Copy for agent to keep - - - - - | 0 | 2 | 0 |
| Attending filing, when filed under the statute - - - - - | 0 | 3 | 4 |
| Attending stamping, when done, and necessary - - - - - | 0 | 3 | 4 |
| Attending judges with pleadings, demurrer-book, special case, &c., one fee - - - - - | 0 | 3 | 4 |
| Attending searching if copy delivered to the other judges, one fee | 0 | 3 | 4 |
| Term fee in town - - - - - | 0 | 10 | 0 |
| Country - - - - - | 0 | 12 | 0 |
| Letters, when no term fee, town - - - - - | 0 | 2 | 0 |
| Ditto, country - - - - - | 0 | 4 | 0 |

N. B.—When proceedings commenced in vacation and continued to following term, or commenced in term and continued in the following vacation, only one term fee in respect thereof, and no additional charges for letters.

COSTS ON WRIT OF DISTRINGAS.

| | | | |
|---|---|----|---|
| Attending at defendant's house to make appointment - - - | 0 | 3 | 4 |
| Attending appointment, and copy and service of writ - - - | 0 | 5 | 0 |
| *438] <i>If appointment and service at a distance, or writ sent to a correspondent, the same for mileage and correspondence, &c., as upon the service of writs.</i> | | | |
| Searching for appearance - - - - - | 0 | 3 | 4 |
| Drawing and Engrossing affidavit to ground distringas, per folio | 0 | 1 | 0 |
| <i>No instructions, or attending to be sworn.</i> | | | |
| Paid oath - - - - - | - | - | - |
| Affidavit of no appearance being entered, and oath - - - | 0 | 5 | 0 |
| <i>This is to be allowed when it cannot be incorporated in the special affidavit.</i> | | | |
| Attending the judge for order for distringas - - - - - | 0 | 3 | 4 |
| Paid for same - - - - - | 0 | 3 | - |
| Writ of distringas - - - - - | 0 | 12 | - |
| Attending for warrant - - - - - | 0 | 3 | 4 |
| Copy writ, and notice for defendant - - - - - | 0 | 2 | 0 |
| The like for sheriff - - - - - | 0 | 2 | 0 |
| <i>Paid for warrant, as usual.</i> | | | |
| Instructing sheriff's officer - - - - - | 0 | 3 | 4 |
| <i>Paid officer, as per scale of sheriff's fees.</i> | | | |
| Attending for order to return writ - - - - - | 0 | 3 | 4 |

| | £ | s. | d. |
|---|---|----|----|
| I aid for same - - - - - | 0 | 2 | 0 |
| Copy and service, and paid sheriff therewith - - - - - | 0 | 4 | 0 |
| Short copy of writ and return - - - - - | 0 | 1 | 0 |
| Paid for return - - - - - | 0 | 2 | 0 |
| Attending for return and to file same, when sheriff not ruled or ordered to return it - - - - - | 0 | 3 | 4 |
| Drawing and engrossing affidavit of officer <i>nulla bona</i> , and oath <i>No instructions, or attending to be sworn.</i> | 0 | 5 | 0 |
| Searching again for appearance - - - - - | 0 | 3 | 4 |
| Affidavit of no appearance, and oath - - - - - | 0 | 5 | 0 |
| Attending judge for order for leave to enter appearance - - - - - | 0 | 3 | 4 |
| *439] *Paid for the order, and filing affidavit, if writ obtained <i>In Term Time, Additional.</i> | 0 | 3 | 0 |
| Briefing affidavit for counsel, per folio - - - - - | 0 | 0 | 4 |
| Instructing counsel - - - - - | 0 | 3 | 4 |
| Fee to counsel - - - - - | 0 | 10 | 6 |
| Attending him and court, and to draw up rule - - - - - | 0 | 3 | 4 |
| Paid for the rule, and filing affidavit - - - - - | 0 | 5 | 0 |
| <i>The like charges on obtaining rule for leave to enter an appearance for defendant.</i> | | | |

BILL OF COSTS UPON WRIT OF SUMMONS.

Where debt and costs paid within the four days or upon a judge's order, when time given for payment.

| | | | |
|---|---|----|---|
| Letter before action, if sent - - - - - | 0 | 2 | 0 |
| Instructions to sue - - - - - | 0 | 3 | 4 |
| Writ of summons - - - - - | 0 | 12 | 6 |
| Bills of cost to endorse - - - - - | 0 | 2 | 0 |
| Copy and service - - - - - | 0 | 5 | 0 |

If served at a distance, or sent to a correspondent, same as on service of writs, ante.

| | | | |
|------------------------------|---|---|---|
| Attending settling - - - - - | 0 | 3 | 4 |
| Letters, as before. | | | |

If time given.

| | | | |
|---|---|---|---|
| Attending defendant on his applying for time to pay debt and costs, and attending on plaintiff, and getting his consent, and agreeing on terms, &c. Drawing consent for a judge's order, and fair copy, and attending getting same signed, <i>one fee</i> , not exceeding | 0 | 6 | 8 |
| *440] *Paid for summons and order - - - - - | | | |
| Attending for same - - - - - | 0 | 3 | 4 |
| Attending for appointment to tax, if necessary - - - - - | 0 | 3 | 4 |
| Copy and service of order, if necessary - - - - - | 0 | 3 | 0 |

| | £ | s. | d. |
|--|---|----|----|
| Bill of costs and copy - - - - - | 0 | 3 | 0 |
| Copy for the other side, if made - - - - - | 0 | 1 | 6 |
| Attending taxing - - - - - | 0 | 3 | 4 |
| Paid - - - - - | | | |
| Letters, &c., as before. | | | |

DECLARATION IN DEBT, AND FINAL JUDGMENT BY DEFAULT.

(For the previous costs, see ante.)

| | | | |
|--|---|---|----|
| Searching for appearance - - - - - | 0 | 3 | 4 |
| Affidavit of service - - - - - | 0 | 5 | 0 |
| Entering appearance, sec. stat. - - - - - | 0 | 6 | 0 |
| Instructions for declaration - - - - - | 0 | 3 | 4 |
| Drawing same, folio 4 - - - - - | 0 | 4 | 0 |
| Fee to pleader, if special - - - - - | | | |
| Attending him - - - - - | 0 | 3 | 4 |
| Engrossing declaration - - - - - | 0 | 1 | 4 |
| Close copy, if agency - - - - - | 0 | 1 | 4 |
| Particulars of demand - - - - - | 0 | 2 | 6 |
| Rule to plead - - - - - | 0 | 1 | 6 |
| Demand of plea, if appearance entered by defendant - - - - - | 0 | 3 | 0 |
| Drawing final judgment - - - - - | 0 | 3 | 4 |
| Attending to sign - - - - - | 0 | 3 | 4 |
| Engrossing proceedings on paper, folio 9 - - - - - | 0 | 3 | 0 |
| Entering on the roll - - - - - | 0 | 3 | 0 |
| Paid roll - - - - - | 0 | 0 | 10 |
| Paid signing judgment - - - - - | 0 | 7 | 0 |
| Paid usher - - - - - | 0 | 1 | 0 |

*In Common Pleas, 3s. extra for docket.

*441] Drawing bill of costs, and copy, as before.

Copy for defendant's attorney, ditto.

| | | | |
|---|---|----|---|
| Notice of taxing, if defendant entitled thereto - - - - - | 0 | 3 | 0 |
| Attending taxing - - - - - | 0 | 3 | 4 |
| Paid taxing - - - - - | | | |
| Term fee, in town - - - - - | 0 | 10 | 0 |
| Ditto, in country - - - - - | 0 | 12 | 0 |

INTERLOCUTORY JUDGMENT AND INQUIRY.

| | | | |
|---|---|---|----|
| Drawing interlocutory judgment - - - - - | 0 | 3 | 4 |
| Attending, to sign same - - - - - | 0 | 3 | 4 |
| Paid signing - - - - - | 0 | 5 | 0 |
| Engrossing proceedings on paper, folios 8 (if declaration folios 4) - - - - - | 0 | 2 | 8 |
| Entering on the roll - - - - - | 0 | 2 | 8 |
| Paid for roll - - - - - | 0 | 0 | 10 |

| | £ | s. | d. |
|--|---|----|-------------|
| Instructions for, and drawing, inquiry - - - - - | | | <i>Nil.</i> |
| Engrossing inquiry, folio 8 - - - - - | 0 | 2 | 8 |
| Paid for parchment - - - - - | 0 | 2 | 0 |
| Paid signing and sealing - - - - - | 0 | 5 | 0 |
| Fee thereon - - - - - | 0 | 3 | 4 |
| Notice of inquiry, copy and service - - - - - | 0 | 3 | 0 |

If at a distance, or sent to a correspondent, the extra charges the same as serving writ, as before.

| | | | |
|--|---|---|---|
| Attending, to leave inquiry with the sheriff - - - - - | 0 | 3 | 4 |
| Paid thereon - - - - - | 0 | 4 | 0 |
| If sent to a correspondent to lodge with sheriff, or to under-sheriff, writing therewith - - - - - | 0 | 2 | 0 |
| For agent's charges for lodging writ with sheriff, and letter in reply - - - - - | 0 | 5 | 4 |
| *442] *Paid for deputation (if a saving of expense) - - - - - | 1 | 1 | 0 |
| Attending for same, and writing therewith - - - - - | 0 | 3 | 4 |
| Subpoena - - - - - | 0 | 5 | 0 |
| Copy and service on each witness - - - - - | 0 | 3 | 0 |

If served at a distance, or sent to a correspondent, as before.

| | | | |
|--|---|----|---|
| Minutes of evidence - - - - - | 0 | 6 | 8 |
| Attending inquiry, if in same town with attorney - - - - - | 0 | 13 | 4 |
| If attended by agent to him - - - - - | 1 | 1 | 0 |
| Paid sheriff executing inquiry, bailiffs, jury, &c. (including the 4s. paid on leaving), not exceeding - - - - - | 1 | 15 | 0 |

Paid sheriff for travelling expenses, *according to scale.*

Paid for use of room, where necessary, *according to scale.*

Paid witnesses, *according to general allowance.*

| | | | |
|---------------------------------|---|---|---|
| Affidavit of increase - - - - - | 0 | 5 | 0 |
| Attending for inquiry - - - - - | 0 | 3 | 4 |
| Paid for same - - - - - | 0 | 1 | 0 |
| Drawing judgment - - - - - | 0 | 3 | 4 |
| Attending to sign - - - - - | 0 | 3 | 4 |
| Paid signing - - - - - | 0 | 7 | 0 |
| Paid ushers - - - - - | 0 | 1 | 0 |

In Common Pleas, 3s. more.

| | | | |
|---|---|---|---|
| Paid filing affidavit of increase - - - - - | 0 | 1 | 0 |
| Copy for defendant's attorney, not exceeding - - - - - | 0 | 2 | 0 |
| Drawing bill of costs and copy, <i>as before</i> - - - - - | 0 | 4 | 0 |
| Copy for defendant's attorney, if done, <i>as before.</i> | | | |
| Notice of taxing, if defendant has appeared, or is entitled thereto | 0 | 3 | 0 |
| Attending taxing - - - - - | 0 | 3 | 4 |

Paid taxing, *as usual.*

*443] *No attending to complete judgment on roll.

Term fee *as before.*

WRIT OF TRIAL.

| | £ | s. | d. |
|---|---|----|----|
| General issue pleaded, drawing replication, including close copy, | | | |
| if agency - - - - - | 0 | 3 | 0 |
| Paid for summons for writ of trial - - - - - | 0 | 1 | 0 |
| Copy and service - - - - - | 0 | 3 | 0 |
| Attending - - - - - | 0 | 3 | 4 |
| Paid for order - - - - - | 0 | 1 | 0 |
| Copy and service - - - - - | 0 | 3 | 0 |
| Drawing issue, of whatever length - - - - - | 0 | 3 | 4 |
| Engrossing to deliver, folio 8 (if declaration folio 4) - - - - - | 0 | 2 | 8 |
| Entering on the roll - - - - - | 0 | 2 | 0 |
| Paid for roll - - - - - | 0 | 0 | 10 |
| Close copy, if agency - - - - - | 0 | 2 | 8 |
| Notice of trial, including close copy, if agency - - - - - | 0 | 3 | 0 |
| Engrossing writ of trial, folio 12 - - - - - | 0 | 4 | 0 |
| Paid parchment - - - - - | 0 | 2 | 0 |
| Paid signing and sealing - - - - - | 0 | 2 | 0 |
| Fee thereon - - - - - | 0 | 3 | 4 |
| Copy particulars to annex - - - - - | 0 | 1 | 0 |
| Attending to leave writ at sheriff's office, subpœna, and serving witnesses, <i>the same as upon writ of inquiry.</i> | | | |
| Notice to produce, copy and service, not exceeding - - - - - | 0 | 5 | 0 |
| The like to admit, ditto - - - - - | 0 | 5 | 0 |
| Attending <i>inspection</i> (plaintiff or defendant) - - - - - | 0 | 3 | 4 |
| Paid summons to admit - - - - - | | | |
| Copy and service - - - - - | 0 | 3 | 0 |
| *444] *Attending - - - - - | 0 | 3 | 4 |
| The like charge on second summons, if first not attended - - - - - | 0 | 8 | 4 |
| Affidavit of service and attendance - - - - - | 0 | 5 | 0 |
| Paid for order - - - - - | | | |
| Copy and service - - - - - | 0 | 3 | 0 |
| Attending trial, <i>as before.</i> | | | |
| If writ altered or re-sealed, and witnesses reserved, <i>as before.</i> | | | |
| Paid sheriff's fees (<i>including the 4s. paid with writ,</i>) not exceed- ing, in country causes - - - - - | 1 | 15 | 0 |
| Paid for room, where necessary <i>according to scale.</i> | | | |
| Paid for deputation, &c. | | | |
| Paid sheriff extra for travelling, <i>same as on inquiry</i> ; such pay- ments <i>in town causes not exceeding</i> - - - - - | 1 | 13 | 0 |
| <i>The charges for final judgment, the same as upon writ of inquiry.</i> | | | |
| Bill of costs and copy, and attending taxing <i>as before.</i> | | | |
| Term fee <i>as before.</i> | | | |

If Special Pleas.

The charges to be regulated according to the lengths, and order and rules to plead several matters, as usual.

Motion for a new trial upon writ of trial.

| | £ | s. | d. |
|--|---|----|----|
| Attending the under-sheriff for a copy of his notes - - - - - | 0 | 3 | 4 |
| Paid for the same - - - - - | - | - | - |
| Affidavit to verify same - - - - - | 0 | 5 | 0 |
| Instructions for counsel to move - - - - - | 0 | 6 | 8 |
| Making copy of sheriff's notes to accompany, per folio - - - - - | 0 | 0 | 4 |
| *445] *Paid fee - - - - - | 1 | 3 | 6 |
| Attending - - - - - | 0 | 3 | 4 |
| Attending court, rule nisi granted and for rule - - - - - | 0 | 6 | 8 |
| Paid for rule and filing affidavit - - - - - | 0 | 5 | 0 |
| Copy and service - - - - - | 0 | 4 | 0 |
| Affidavit of service - - - - - | 0 | 5 | 0 |
| Instructions for counsel to move rule absolute - - - - - | 0 | 3 | 4 |
| Copy rule to annex - - - - - | 0 | 1 | 0 |
| Paid counsel to move (<i>from one guinea to two guineas</i>) - - - - - | - | - | - |
| Attending him - - - - - | 0 | 3 | 4 |
| Attending court, motion did not come on 3s. 4d. each day, not to exceed 20s. in a term - - - - - | - | - | - |
| Attending court—rule absolute - - - - - | 0 | 6 | 8 |
| Paid for the rule and filing affidavit - - - - - | 0 | 5 | 0 |
| Copy and service - - - - - | 0 | 4 | 0 |
| Copy sent, if agency - - - - - | 0 | 1 | 0 |
| Term fee, as usual. | | | |

COMPUTING PRINCIPAL AND INTEREST ON JUDGE'S ORDER.

Costs of declaration and judgment, as before according to length of declaration.

The usual charges for summons and order to compute, the same as upon order to admit upon writ of trial.

| | | | |
|--|---|----|---|
| Instructions for counsel to move for rule - - - - - | 0 | 3 | 4 |
| Paid counsel to move - - - - - | 0 | 10 | 6 |
| Attending him, and to draw up rule - - - - - | 0 | 3 | 4 |
| Paid for rule - - - - - | 0 | 5 | 0 |
| Attending for appointment to tax - - - - - | 0 | 3 | 4 |
| Copy and service of rule, and appointment - - - - - | 0 | 4 | 0 |
| Bill of costs and copy, and for final judgment, <i>the same as in judgment in debt</i> - - - - - | - | - | - |

*446] *If defendant served at a distance, extra for serving summons and rules to compute, *same as serving writ.*

If in Term time.

| | £ | s. | d. |
|--|---|----|----|
| Affidavit of cause of action - - - - - | 0 | 5 | 0 |
| Instructions for counsel to move - - - - - | 0 | 3 | 4 |
| Fee to him - - - - - | 0 | 10 | 6 |
| Attending him and court, and to draw up rule | 0 | 6 | 8 |
| Paid for rule - - - - - | 0 | 5 | 0 |
| Copy and service - - - - - | 0 | 4 | 0 |
| Affidavit of service - - - - - | 0 | 5 | 0 |
| Instructions to make rule absolute - - - - - | 0 | 3 | 4 |
| Copy rule, to annex - - - - - | 0 | 1 | 0 |
| Fee to counsel - - - - - | 1 | 3 | 6 |
| Attending him and court, and to draw up rule | 0 | 6 | 8 |
| Paid for rule - - - - - | 0 | 5 | 0 |
| Attending, for appointment to tax - - - - - | 0 | 3 | 4 |
| Copy and service - - - - - | 0 | 4 | 0 |

No attending at Westminster to complete roll.

If defendant served at a distance, extra for serving summons and rule to compute, *the same as serving writ.*

COSTS OF EXECUTION.

| | | | |
|---|---|---|---|
| Writ of <i>fi. fa.</i> , if only one writ, or a <i>testatum</i> - - - - - | 0 | 7 | 0 |
| Attending for warrant - - - - - | 0 | 3 | 4 |
| Paid for warrant, <i>as usual.</i> | | | |
| Instructing officer - - - - - | 0 | 3 | 4 |
| If previous writ issued where venue is laid, to ground <i>testatum</i> | | | |
| writ of <i>fi. fa.</i> - - - - - | 0 | 6 | 0 |
| *447] Attending, to lodge same with sheriff, and *instructing | | | |
| him to return <i>nulla bona</i> , and afterwards, for return - | 0 | 3 | 4 |
| Paid for return - - - - - | 0 | 2 | 0 |
| Short copy of writ and return, to keep - - - - - | 0 | 1 | 0 |
| Paid filing writ and return, and attending - - - - - | 0 | 3 | 4 |

The foregoing charges are intended as examples.

The masters will exercise their discretion in allowing for attendances, having regard to the expense saved, or favour granted to the party, and to all the circumstances of the case, bearing in mind that for attendances the allowances are not to be more than half what are allowed when costs are taxed upon the usual scale.

In other cases not hereby provided for, the masters will conform to the

rate of charges hereinbefore inserted, or as near thereto as circumstances will allow.

DENMAN.

N. C. TINDAL.

FRED. POLLOCK.

J. PARKE.

E. H. ALDERSON.

J. PATTESON.

J. GURNEY.

J. WILLIAMS.

J. T. COLERIDGE.

T. COLTMAN.

R. M. ROLFE.

WM. WIGHTMAN.

C. CRESSWELL.

*PERCIVAL v. RUSSELL. May 22.

[*448

Notice by a defendant, who has been twelve calendar months in execution for a debt not exceeding 20*l.*, of his intention to apply for his discharge under the 48 G. 3, c. 123, may be served on his attorney, where the residence of the plaintiff cannot be discovered.

MANNING, Serjt., moved, under the 48 G. 3, c. 123, for the discharge of a prisoner, who had been twelve calendar months in execution for a debt not exceeding 20*l.*, upon an affidavit stating that the defendant had been unable to discover the plaintiff's place of residence, and that notice of the motion had been served upon the plaintiff's attorney. The plaintiff cannot, by withdrawing or concealing himself, deprive the defendant of the benefit conferred by the statute. Besides which, although it is said that the authority of the attorney is determined upon judgment being obtained, that is true only to a certain extent. The plaintiff may, indeed, employ another attorney without a rule to *change* his attorney; but if he employs a different attorney to issue execution, a new warrant of attorney must be filed; whereas execution may be issued by the attorney in the action without any new warrant. Here, the execution was issued without any change. The attorney, upon whom the notice was served, was the attorney in the matter *of the execution*, as well as attorney in the action. In *Wilson v. Mokler*, 1 Dowl. P. C. 549, a service on the plaintiff's attorney under circumstances nearly similar, was held sufficient.

TINDAL, C. J. Generally speaking, the authority of the attorney is at an end when final judgment is obtained. But I do not see how the notice could, under the circumstances, be served in any other manner.

Per Curiam;

Rule granted.

*REYNOLDS v. BARFORD.

[*449

Under the 8 Ann. c. 14, s. 1, the landlord is entitled as against the execution-creditor, only to rent due at the time of the seizure. But if the sheriff returns that he has paid so much "*for rent due for the premises*," the court will intend that the payment was for rent due at the time of the seizure; and it is no objection to the return that it does not expressly state that the rent was due at the time of the seizure.

Where the sheriff returns that he has retained a sum for possession-money, it is no ground for quashing the return, that the plaintiff is charged with more possession-money than the amount payable by him for keeping possession.

On the 1st of February, 1844, certain goods of the defendant were taken in execution under a *fi. fa.* On the 4th, Mary Clark caused the officer in possession to be served with a notice of claim. On the 8th, the defendant obtained, under the interpleader act, a judge's order—that the sheriff be discharged; that the goods seized under the *fi. facias* herein be sold, and the produce thereof be paid into court, deducting expenses, unless within a week the claimant shall give security to the satisfaction of the master to the amount of the levy—the claimant in the first instance to pay possession-money from this day till the goods are sold, or security be given, but ultimately by the losing party; that an issue be tried at the next assizes for Surrey, in which the claimant shall be plaintiff, and the execution-creditor defendant; the question to be whether the goods seized were, at the time of the seizure, the goods of the claimant; all other questions reserved.

On the 15th the defendant was served with notice from the landlord of a claim of 11*l.* 5*s.* for a quarter's rent, due at Christmas. On the 13th of April, Mary Clark having omitted to give the security required, an order *450] was made discharging the former order,^(a) *barring the claim of Mary Clark; and directing the proceeds of the sale to be paid to the execution-creditor.

On the 20th of April, the sheriff made the following return:—

“*Surrey.* By virtue of the annexed writ to me directed, I have caused to be made of the goods and chattels of John Barford therein named, 22*l.* 2*s.*, out of which I have paid 11*l.* 5*s.*, for rent due for the premises whereon the said goods and chattels were taken in execution; and I have retained 6*l.* 12*s.* for levying the said execution, keeping possession of the said goods and chattels, and selling the same by public auction, and for poundage; and the residue thereof, being 4*l.* 5*s.*, I have ready to pay to Frederick Reynolds in the said writ named as therein I am commanded: and I further certify that the said John Barford hath not any other goods or chattels in my bailiwick whereof I can cause to be made the residue of the debt and damages therein mentioned. or any part thereof.”

Channell, Serjt., on behalf of the plaintiff, having obtained a rule nisi, to quash the return,

Byles, Serjt., now showed cause. The dates in this case are material. If the order stands in all its parts, the sheriff is discharged. The main ground of objection to this return is understood to be that the rent was not due at the time of the seizure. [*Channell*, Serjt. Though the rent was not due in fact, the objection is that the return does not state when the rent became due. The plaintiff also objects that the sheriff had no power under the interpleader act to charge the plaintiff with the expense of keeping pos-

(a) The sheriff being discharged by the first order, and being no longer before the court, the first order could not be discharged as to him; vide post, 451.

session.] The rent did not accrue whilst the sheriff was in possession. There is a complete answer to the objection upon the affidavits. But it is contended that the return is insufficient *per se*. The sheriff *makes his return according to the information communicated to him by the [*451 notice. [CRESSWELL, J. Must not you pledge yourself to the truth of your return?] The notice is dated February 15th, and states the rent to be “now due and owing,” which means that there was an arrear of rent. Looking at this written document, the ground of the application fails. [TINDAL, C. J. You do not say that the rent was due at the time of the seizure.] If the return is good in form, it is true in fact. The plaintiff was not entitled to rule the sheriff to return the writ. The sheriff was discharged by the first order; under which order he sold. [CRESSWELL, J. But you have made a return.] We were not bound to make it. [CRESSWELL, J. Then it may be quashed.] The return does the plaintiff no harm. [CRESSWELL, J. And it does you no good.] After the order the sheriff ceases to act as sheriff and acts merely as stakeholder. [COLTMAN, J. There must be some mode of ascertaining what the expense is.] After the order the plaintiff was precluded, not only from ruling the sheriff to return the writ, but also from taking any exception to the return when made. The sheriff has no interest in the matter in dispute. [TINDAL, C. J. Does not the second order, by discharging the first, set the matter at large?] It is submitted that it does not. The first order is not discharged so far as that order discharges the sheriff. He was no party to the second order, and could not be deprived by it, of any benefit which he had obtained under the first. It may be admitted that the rent must be due at the time of the seizure; but this return may receive the same construction as the act itself, in which the language is equally general, the words of the fourth section being “that no goods, &c., lying, &c., shall be liable to be taken by virtue of any execution, unless the party at whose suit the said execution is sued out, shall, before the removal (a) *of such goods from off the [*452 said premises by virtue of such execution, pay to the landlord of the said premises, or his bailiff, all such sums or sums of money as are or shall be due for rent for the said premises at the time of the taking such goods or chattels by virtue of such execution. [CRESSWELL, J. There are several returns under this statute in Tidd.] (b) If the present return is held good, all the forms found in Tidd will be right. *Hepworth v. Sanderson*, 8 Bingh. 19, 1 Moore & Scott, 64, shows, that no action would lie upon this return, and that the court would allow it to be taken off the file if necessary.

Channell, Serjt., (with whom was *Leech*), in support of the rule. The sheriff has no right to charge the plaintiff with possession-money. [COLTMAN, J. How does it appear upon this return that *he* is so charged?] It certainly does not appear how the charge for possession is constituted. [COLTMAN, J. Have we any thing to do with the truth of the return?] If an

(a) Vide *Smallman v. Pollard*, ante, Vol. VI. 1003.

(b) Tidd's Appendix, 8th ed. 371.

action is brought for a false return, the sheriff must prove that the rent was due at the time of his entry. The sheriff might, at the trial, say that such was not the meaning of the statement in the return. [TINDAL, C. J. The sheriff could not stand upon the ground of affixing to the language of his return a meaning which would show that he had returned matter which he was not authorized to return. COLTMAN, J. If the sheriff returned that he had levied 20*l.*, and had paid away 15*l.* in a manner not justifiable, would he not remain liable?] If it be clear that the sheriff cannot make the deduction, the court will, it is conceived, quash this return. [CRESSWELL, J. Would not the execution-creditor in that case apply for a rule calling upon the sheriff to pay over the money levied, without making such deduction? *453] It may be that here the sheriff has not paid over enough; should you not have applied to the court for a rule calling upon the sheriff to pay over to you the money levied? Suppose the sheriff had returned that he had paid rent which accrued due *after* the seizure in execution, could we quash the return?] In *The King v. The Sheriff of Middlesex*, in *Williams v. Pennell*, 1 B. & Ald. 190, the sheriff returned that he did, on, &c., arrest and take the body of the defendant, and detain him until afterwards he rescued himself out of the sheriff's custody, and that afterwards, and before the return of the principal, he was not found in the sheriff's bailiwick. This return was quashed on the ground that it did not state that the arrest had taken place within the county. (He was then directed by the court to go to the second point.)

At common law, the court would not quash the sheriff's return, because it appeared that the sheriff had improperly kept possession. But the case is different when the sheriff applies for relief under the interpleader act, and obtains that relief on the terms of not charging any further expense of keeping possession. The court, in the exercise of its equitable jurisdiction over its own officers, may quash a return made under the statute in which such a charge is improperly inserted. [TINDAL, C. J. Upon an application to quash for insufficiency, we must look at the face of the return. I do not see how we can take notice of what does not appear on the return itself.] If the return cannot be quashed for insufficiency, the court may set it aside, as being made in fraud of the sheriff's own agreement.

TINDAL, C. J. We wish to look at the old returns in Dalton.

Cur. adv. vult.

*454] TINDAL, C. J., now delivered the opinion of the court. This was a rule to show cause why the sheriff's return to a writ of *fiery facias* should not be quashed. The return was as follows:—His lordship then read the return as above set out. (a)

The principal objection urged against the return was, that it did not show distinctly that the rent paid to the landlord was due at the time when the sheriff made the seizure, but was consistent with the rent being due only at the time of the return: and it was argued that no intendment could

be made to support the sheriff's return. No authority, however, was cited to show that a rule of such extreme rigor has ever been applied to sheriffs' returns: on the contrary, cases are not wanting to show, that, in making returns to writs, a reasonable degree of certainty is sufficient, and at least not such precise certainty required as in pleading as was said by the court in the city of *London's* case, 8 Co. 128. a(a) Thus, in a case where the King sued out a writ founded on the statute of provisors, (27 Ed. 3, stat. 1, c. 1,) which requires that the defendant should be warned two months before *the return, and the sheriff returned *præmunire feci, &c., quod esset coram iudiciariis, &c., ad idem* (which is evidently a misprint [455 for *diem* (b),) in *breve contentum, ad faciendum quod istud breve requirit*: it was objected (c) that it did not appear that he had warned him two months before the return; to which it was answered (d) that it should be intended to be as the writ requires; and, if the sheriff has not done his office duly, he may have his remedy by writ of deceit; 39 Ed. 3, 7 Bro. *Retourne de Brief*, pl. 56. (e) So, where a *scire facias* issued against a parson, to have execution of an annuity, the sheriff returned that he had commanded the bailiff of the franchise, who had returned to him that long before the return of the writ the parson had resigned his benefice to another, *et quod non habet bona neque catulla infra, &c.* It was objected that he ought to have returned *quod non habet bona neque habuit tempore receptionis brevis*; for it might be that now he has not but had then: but it was answered that it shall be intended by this return, that, at the time of the receipt of the writ, he had them not: and afterwards the court held the return good enough; 2 Ed. 4, fo. 1, pl. 1. (f)

(a) The (second) objection taken in that case, was that the return was by way of recital and not of direct affirmation. To which the court answered, "This is not upon a demurrer in law, but upon a return upon a writ of privilege, upon which no issue can be taken or demurrer joined, nor upon our award in this does any error lie; and therefore the return is only (*nient auer*), but to certify (*asserter*), the court of the truth of the matter, in which such precise certainty is not required as in pleading." This resolution in the *Case del citie de Londres*, was referred to in *Barnes's case*, 2 Roll. Rep. 157, where the return to a *habeas corpus* was held good, notwithstanding its alleged uncertainty.

Although the term "certainty" is here used, it may be thought that the analogy between the uncertainty arising from the statement by way of recital, of that which would more properly form the subject of positive allegation, and the uncertainty which arises from the omission to set out in any manner, either by way of recital or by way of positive allegation, that, without the existence of which, the return would be altogether nugatory, is not very strong.

(b) This misprint occurs in both editions of the Year-books.

(c) By Cavendish, Serjeant, afterwards C. J. of K. B.

(d) By Finchden, king's serjeant, afterwards justice of Common Pleas, who said, that in writs at common law there must be fifteen days between the teste and the return of process, but that in pleading it was never alleged that this interval had elapsed.

(e) *The King v. The Bishop of Chichester*, P. 39 E. 3, fo. 7, Fitz. Abr. tit. *Retourne de viscount*, pl. 61. The principal question in that case was, whether parties were bound to take notice of an act of parliament before it had been proclaimed in the county court; and whether a statute was good without the assent of the Commons. Both of these questions were ruled by Thorpe (C. J. of C. P.) in the affirmative; and judgment was given that the bishop should be put out of the king's protection, and should forfeit his goods and chattels; but whether his body should be taken or not, the court would advise, &c.

(f) This does not appear to have been a final decision; for, after stating that the court "held the return good enough," the report immediately proceeds as follows:—"Afterwards Priot (C. J. of C. P.) said—the sheriff's deputy is in the hall, and we can send to him to see

*456] *The case last cited has a striking analogy to the present. The present return, after it has stated a seizure under the writ, specifies a payment of rent due to the landlord; and in so doing must be intended to refer to such rent as is due to the landlord, according to the rules of law under a seizure by the writ, that is to say, rent due at the time of the seizure.

If, in truth, the rent was not due at the time of the seizure, an action for a false return would, we think, clearly lie on this return, which, as against the sheriff, would be understood to mean that the rent was due at the time of the seizure; for, he could never be allowed to defend himself in such an action by putting a construction on his own return making it bad, when it admits of another construction which will make it good.

It was further objected, that, by the order made in the interpleader rule in this case, the costs of keeping possession were directed to be borne by the claimant; and that the return is bad because it claims a deduction for possession-money. To this the answer is, that the possession-money payable by the claimant is but a part of the possession-money, namely, that which became due subsequently to the making of the order; that there is other possession-money which the sheriff is entitled to claim against the fund; and that it does not appear that he has deducted any other than that which he has a right to. If, in fact, he has deducted more than he was entitled to, the party is not without his remedy. Rule discharged.

if he will amend the return in this point. Winslade, clerk, said to the justices, Prisot being out of court, (*hors del Place*), that the return was made to the sheriff, *ut supra*, by the bailiff of the franchise; wherefore, &c. Danby, J. Then the amercement shall be upon the bailiff Moyle, J. Well, so I think it shall be, &c." P. 2, E. 4, fo. 1, pl. 1.

*457] *REDMOND v. SMITH and Another. May 29.

To a declaration on a policy of assurance, alleging that the insurance was made by A. as agent for the plaintiff and on his account, and for his use and benefit, and that A. received the order for, and effected, the insurance as such agent, the defendant pleaded the policy was not made by A. as agent for the plaintiff, or on his account, or for his use and benefit, and that A. did not receive the order for, or effect, the assurance as such agent. *Held*, bad, on special demurrer, as amounting to non assumpsit.

The defendant also pleaded that there was not any agreement signed by the master, and seamen, or any of them, specifying what wages each seaman was to be paid, the capacity in which he was to act, or the nature of the voyage in which the ship was to be employed. *Held*, bad, on general demurrer.

ASSUMPSIT, on a policy of insurance.

The declaration stated that the plaintiff, by certain persons called or known by the name, style, and firm of H. & J. Johnston & Co., the plaintiff's agents in that behalf, on the 2d of July, 1842, caused to be made a certain policy of assurance, purporting thereby, and containing therein, that the said H. & J. Johnston & Co., as well in their own names as for and in the name and names of all and every person and persons to whom the same did, might, or should appertain, in part or in all, did make assurance and

cause themselves, and them and every of them, to be assured with and by the defendants, lost or not lost, for the space of twelve calendar months, commencing on the 1st of July, 1842, and ending on the 30th of June, 1843, both days inclusive, in port and at sea, in docks, and on ways, at all times, in all places, and in all services,—warranted to be employed in the coasting trade of the United Kingdom, with leave to call at any ports or places, for any purposes, and to tow vessels,—upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the good ship called the *Brigand*, (steamer,) whereof was master, for that voyage, — - —, or whosoever should go for master in the said ship, or by whatsoever other name or names the same ship or the master thereof was or should be named or called, *beginning the adventure upon the same ship, body, [458 tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the said good ship as above; and that it should be lawful for the said ship, &c., to proceed and sail to, and touch and stay at, any ports or places whatsoever in the course of the said voyage for all necessary purposes, without prejudice to that assurance. The said ship, &c., for so much as concerned the assured by agreement made between the assured and the defendants in that policy, were and should be rated and valued in manner following, that is to say, hull and materials should be valued at 7500*l.*, machinery should be valued at 7500*l.*, to pay average on each, as if separately insured.

Touching the adventures and perils which the defendants were contented to bear, and did take upon them, in that voyage, they were of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people of what nation, condition or quality soever, barratry of the master and mariners, and of all other perils, losses, misfortunes that had or should come to the hurt, detriment or damage of the said ship, &c., or any part thereof; and that, in case of any loss or misfortune, it should be lawful to the assured, their factors, servants and assigns, to sue, labour and travail, for, in, and about the defence, safeguard and recovery of the said ship, &c., or any part thereof, without prejudice to that assurance; to the charges whereof the defendants would contribute according to the rate and quantity of the sum therein assured. And the defendants were contented, and did thereby promise and bind themselves to the assured, their executors, administrators, and assigns, for the true performance of the premises, confessing themselves paid the consideration due unto them for that *assurance by the assured, at and after the rate [459 of 5*l.* 5*s.* per cent., to return 8*s.* 4*d.* per cent. for each uncommenced month, and 4*s.* per cent. for every fifteen days the ship might be laid up unemployed, notice being given; the risk of fire being borne during such time by the underwriters. The said ship was warranted free of average under 3*l.* per cent. unless general, or the ship should be stranded. And the defendants, by the said policy, undertook the said insurance for the sum

of 3000*l.* sterling. And by a certain memorandum written in the margin of the said policy, it was declared that any claim under the said policy would be paid in London within ten days after adjustment.

Averment: that the said policy of insurance was so made by the said H. & J. Johnston & Co. as aforesaid, as the agent for the plaintiff, and on his account and for his use and benefit; and that the said H. & J. Johnston & Co. did receive the order for, and effect, the said policy of insurance, as such agents as aforesaid. Of all which premises, the defendants afterwards, to wit, on the 2d of July, 1842, had notice. And thereupon on the day and year last aforesaid, in consideration that the plaintiff, at the request of the defendants, had then paid to the defendants a certain sum of money, to wit, 157*l.* 10*s.*, as a premium or reward for the insurance of 3000*l.* of and upon the premises in the said policy mentioned, and had then promised the defendants to perform and fulfil all things in the said policy contained, on the part and behalf of the assured to be performed and fulfilled, the defendants promised the plaintiff that they the defendants would become and be insurers to the plaintiff of the sum of 3000*l.* upon the premises in the said policy mentioned, and would perform all things in the said policy mentioned on their part and behalf, as such insurers of the said sum of 3000*l.*, to be *460] performed, fulfilled, and observed. *Averment: that the defendants then became and were insurers to the plaintiff, and then duly subscribed the said policy of insurance as such insurers of the said sum of 3000*l.* sterling upon the premises in the said policy in that behalf mentioned; that the plaintiff, at the time of the making of the said policy, and from thence continually afterwards, until and at the time of the loss therein-after mentioned, was interested in the said ship in the said policy mentioned to a large value and amount, to wit, to the value and amount of all the moneys by him ever insured or caused to be insured thereon; that, after the making of the said insurance, and whilst the said ship was employed in the said coasting trade, and after the said 1st of July, 1842, mentioned, and before the 30th of June, 1843, to wit, on the 10th of October, 1842, the said ship departed and set sail from the port of Liverpool on a voyage to London; that the said ship, while she was proceeding on her said voyage, and before her arrival at London aforesaid, and whilst she was so employed in the said coasting trade as aforesaid, to wit, on the 12th of October, 1842, upon the high seas, struck against certain rocks, and did thereby then founder and sink in the seas aforesaid, and the same ship, with her tackle, &c., was then totally lost, destroyed, and sunk in the sea aforesaid. Of all which several premises the defendants afterwards, to wit, on the day and year last aforesaid, had notice, and were then requested by the plaintiff to pay him the said sum of 3000*l.* so by them insured as aforesaid, and which sum of 3000*l.* the defendants then ought to have paid, according to the form and effect of the said policy, and of their said promise and undertaking. Yet the defendants did not, &c.

The declaration also contained counts for money had and received, and upon an account stated.

The defendants pleaded, first, non assumpsit; secondly, as to the first count, that the said policy was *not made by the said H. & J. Johnston & Co. as agents for the plaintiff, or on his account, or for his, the plaintiff's, use and benefit; and that the said H. & J. Johnston & Co. did not receive the order for, or effect, the said policy as such agents as aforesaid, as in the first count was alleged; sixthly, as to the first count, that the said policy was made, and that the said loss of the said ship happened, after the passing of a certain act of parliament made and passed in a session of parliament holden in the fifth and sixth years of the reign of King William IV., "to amend and consolidate the laws relating to merchant-seamen of the United Kingdom, and for forming and maintaining a register of all the men engaged in that service," (a)—that the said ship *was, at the several times of sailing on the said voyage, and of the loss in the declaration mentioned, respectively a British-registered ship of the burden of eighty tons and upwards, and that the crew of the said ship then consisted of divers, to wit, twenty seamen, and twenty other persons, (not being apprentices,) and of one master, to wit, one Robert Morris Hunt—that there was not at the time of the sailing of the said ship on the said voyage, or at any other time before or after, any agreement in writing with

(a) By 5 & 6 W. 4, c. 19, after reciting (s. 1) that "the prosperity, strength, and safety of this United Kingdom and of H. M.'s dominions do principally depend on a large, constant, and ready supply of seamen, as well for carrying on the commerce, as for the defence, thereof; and that it is therefore necessary to aid, by all practicable means, the increase of the number of such seamen, and to give them all due encouragement and protection, and, to this end, to amend and consolidate the laws relating to their regulation and government," it is enacted, (s. 2,) that "it shall not be lawful for any master of any ship or vessel belonging to any subject of H. M. of this United Kingdom, trading to parts beyond the seas, or of any British-registered ship, of the burden of eighty tons or upwards, employed in any of the fisheries of the United Kingdom, or in trading coastwise, to carry to sea on any voyage either from this kingdom or from any other place, any seaman or other person as one of his crew or complement, (apprentices excepted,) without first entering into an agreement in writing with every such seaman, specifying what monthly, or other, wages each such seaman is to be paid, the capacity in which he is to act, and the nature of the voyage in which the ship is intended to be employed; so that the seaman may have some means of judging of the probable period for which he is likely to be engaged; and the said agreement shall contain the day of the month and year in which the same shall be made, and shall be signed by the master in the first instance, and by the seamen respectively, at the port or place where such seamen shall be respectively shipped; and the master shall cause the same to be, by, or in the presence of, the party who is to attest their respective signatures thereto, truly and distinctly read over to every such seaman before he shall be required to sign the same, in order that he may be enabled to understand the purport and meaning of the engagement he enters into, and the terms to which he is bound."

And by section 4, it is enacted, "that if any master of any such ship as aforesaid shall carry out to sea any seaman (apprentices excepted) without having first entered into such agreement as is hereby required, he shall for every such offence forfeit and pay the sum of 10*l.* for or in respect of each and every such seaman he shall so carry out contrary to this act; and if any master shall neglect to cause the agreement to be distinctly read over to each such seaman, as by this act he is enjoined, he shall for every such neglect forfeit and pay the sum of 5*l.*; and if any master shall neglect to deposit with the collector or comptroller of the customs a copy of the agreement hereby required to be made and deposited as aforesaid, or shall wilfully deposit a false copy of any such agreement, he shall, for every such neglect or offence, forfeit and pay the sum of 50*l.*"

And see 8 & 9 Vict. c. 116.

the said master and the said seamen and other persons, or any of them, signed by the said master and the said seamen and other persons, or any of them, specifying what monthly or other wages each of such seamen and other persons, being part of the said crew, or any or either of them was to be paid, the capacity in which he was to act, or the nature of the voyage in which the said ship was intended to be employed; contrary to the statute in that behalf. Wherefore the defendants said that the said voyage was wholly illegal. Verification.

*463] Special demurrer to the second plea, assigning for *causes—that it amounted to a plea of non assumpsit; that the matters of fact therein traversed were included in, and might be given in evidence under, the issue joined on non assumpsit; that the pleading, in the manner as pleaded by the defendants in the said second plea, tended to prolixity and unnecessary length; that the said second plea contained a negative pregnant, inasmuch as it was *pregnant with doubt* whether the defendants, by their said second plea, meant to say that the policy was not made at all, or whether they meant to say that such policy was not made by H. & J. Johnston & Co. as the agents for the plaintiff, or on his account, or for his use and benefit;—that the plea was multifarious and double, and traversed several matters of fact, &c.

General demurrer to the sixth plea. (a)

The defendant joined in demurrer upon the demurrers to each of these pleas.

Channell, Serjt., in support of the demurrer. The defence intended to be set up by the second plea arises upon the 28 G. 3, c. 56, which makes it unlawful to effect any policy on vessel or goods, without first inserting, or causing to be inserted, in such policy, the name or names, or the usual style and form of dealing, of one or more of the persons interested in such assurance, &c.; the second section providing that any policy made *contrary to the intent and meaning of the act, shall be void. (b)

*464] It is submitted that this defence might have been given in evidence under non assumpsit. The plea virtually denies the contract stated in the declaration. It is impossible to distinguish this case from *Sutherland v. Pratt*, 11 M. & W. 296, 2 Dowl. N. S. 813. According to that case a plea simply denying the contract would have thrown upon the plaintiff the same burden of proof as is sought to be thrown on him here by the second plea. [COLTMAN, J. This plea also denies the receiving of the order from

(a) In the margin of the demurrer-book the following points were stated on behalf of the plaintiff,—that the sixth plea is defective in substance, inasmuch as it alleges no facts which would constitute such an illegality in the voyage, as to render the policy void, or which would afford any answer to this action;—that the plea is defective in substance, inasmuch as by the 5 & 6 W. 4, c. 19, the agreement required to be entered into with seamen before they are carried to sea on any voyage, is to be entered into with them by the master of any ship or vessel, and the penalty for default is inflicted on the master; and the owner of any ship or vessel, not having knowledge of the master's default, cannot be prejudiced so as to prevent his recovering on a policy effected on such ship.

(b) Vide *infra*, 473.

the plaintiff.] That is only a circuitous mode of denying agency. [TINDAL, C. J. You say that under non assumpsit you would be bound to prove agency. COLTMAN, J. Suppose an agent of the plaintiff had made the contract, it would have been good at common law, but would have been void by the statute.] Non assumpsit puts in issue the allegation that the contract was made *by the plaintiff*.

With respect to the sixth plea, founded upon the 5 & 6 W. 4, c. 19 (a) reliance will probably be placed on *Smart v. Powell*, 1 B. & Adol. 266. There, in an action upon a policy on ship and freight, the defence set up was, that the vessel had not been navigated by a crew of which three (fourth) parts were British, as required by the 6 G. 4, c. 109, (b) in consequence of the death of several of the English sailors on the coast of Africa, and the moral impossibility of supplying their places, except by blacks and other foreigners. The case was held to be brought, by these circumstances, within the clause of the act exempting vessels from its operation, where a due proportion of British seamen cannot be procured, or the proportion is destroyed during the voyage by unavoidable circumstances, the master producing a certificate * of the facts under the hand of a British consul; [*465 or if the master proved the facts to the satisfaction of the comptroller of customs in a British port, or of any person authorized in any other part of the world to inquire into the navigation of such ship, although no certificate had been obtained. In that case it was held necessary, that the excuse for non-compliance with the requisitions of the statute should be proved. There, however, the *freight* would depend on the legality of the voyage; and goods could not be imported except in vessels navigated according to those requisitions. In that case, the voyage was the subject-matter of the contract. In the present case it cannot be successfully contended that the voyage was illegal. In an action by the captain against a seaman, the non-execution of articles of agreement might possibly furnish a defence, on the ground that no valid contract existed, but that cannot be predicated of a contract between the owner and the underwriters. In the present case the want of a competent crew, so as to render the ship unseaworthy, might have furnished a defence to the action; but nothing of that kind is suggested. The defendants must contend that the omission by one seaman to sign the articles would avoid the policy. When the voyage is illegal, a policy on that voyage is illegal; but that is not the case here. [TINDAL, C. J. The object of the statute was the protection of seamen, not to enable the government to see whether a proper number of English seamen were employed or not.] A contract made in contravention of a statute for the protection of the public cannot be enforced; but that rule has no application to the present case. In *Law v. Hodson*, 2 Campb. 147, 11 East, 300, a maker of bricks, not of the dimensions required by the 17 G. 3, c. 42, s. 1, was *not allowed to recover the price. There, the [*466 vendor was the party in fault. The same decision was come to in

(a) *Supra*, 461, n., 462, n.

(b) *Vide* ss. 4 and 12.

Bensley v. Bignold, 5 B. & Ald. 335, where a printer sought to recover for labour and materials in printing a work to which his name was not affixed, as required by the 39 G. 3, c. 79, s. 27; and in *Little v. Poole*, 9 B. & C. 192, where a vendor of coals had omitted to deliver a ticket signed by the meter, as required by the 47 G. 3, sess. 2, c. 68.

But in *Wetherell v. Jones*, 3 B. & Ad. 221, it was held that the provision in the 6 G. 4, c. 80, s. 124, "that no *dealer* in British spirits shall send out, &c., any plain British spirits exceeding a certain strength," did not apply to a distiller or rectifier, and that a sale by such a party of British spirits above the limited strength, was not illegal, and that he might recover the price thereof. In delivering the judgment of the court, Lord TENTERDEN says, (page 225,) "Where a contract which a plaintiff seeks to enforce is expressly, or by implication, forbidden by the statute or common law, no court will lend its assistance to give it effect: and there are numerous cases in the books where an action on the contract has failed, because either the consideration for the promise, or the act to be done, was illegal, as being against the express provisions of the law, or contrary to justice, morality, and sound policy. But where the consideration and the matter to be performed are both legal, we are not aware that a plaintiff has ever been precluded from recovering by an infringement of the law, not contemplated by the contract, in the performance of something to be done on his part."

In *Forster v. Taylor*, 5 B. & Ad. 887, 3 N. & M. 244, which was an action by a farmer for the price of fifteen firkins of butter, which were not *467] branded in the manner required by the 36 G. 3, *c. 86, and 38 G. 3, c. 73, a rule to enter a nonsuit was made absolute, in conformity with the principle laid down in the earlier cases; that the object of those statutes, being the protection of the public against fraud, indirectly prohibited sales in vessels not marked as required by the statutes. In giving the judgment of the court, in *Forster v. Taylor*, LITLEDAL, J., refers to numerous cases; but it is to be observed that in each of those cases the vice appears upon the contract itself. In *Cope v. Rowlands*, 2 M. & W. 149, a broker was not allowed to maintain an action for selling stock, not being duly licensed by the mayor and aldermen of London, pursuant to 6 Ann., c. 16. The contract of insurance in this case is not illegal *per se*; and it has no connection with the contract between the master and the seamen. The non-observance of the provisions of a statute as to one contract, does not vitiate another independent and collateral contract; and whatever may be the effect of the non-signature of the articles in an action between the parties by whom they ought to have been signed, it can have no operation here.

Byles, Serjt., contra. The second and sixth pleas are good. It is admitted on the part of the plaintiff that the former is good in substance; but it is said that it is bad in point of form, as being included in non assumpsit: and also, it is presumed, as involving a negative pregnant. It appears from the declaration that the policy does not contain the name of the plaintiff, bu

only that of H. & J. Johnston & Co., who are said to have insured on the plaintiff's account and for his benefit. Neither does the name of the consignor appear in the policy. The object of the statute was to enable the underwriter to know *who is interested in the subject-matter of the insurance. In this case it was necessary that the declaration should [468] aver that the policy was affected by an agent; and the averment, being material, is properly traversed by the second plea. Upon nonassumpsit the objection that the true name of the plaintiff's agent is not stated, could not have been taken. R. H. 4 W. 4, No. 3. The conclusion to the country is not assigned as a cause of demurrer. The defendant says, the name of the plaintiff's agent not being inserted in the policy, the policy is void; and a subsequent ratification will not avail. (a) In *Sutherland v. Pratt*, the declaration stated that the plaintiff caused a policy to be effected, purporting thereby and containing therein, that Boggs, Taylor & Co., as well in their own names as for and in the names of all and every person to whom the same did, might, or should appertain, made assurance with The General Maritime Assurance Company, for 2000*l.* on goods, lost or not lost, at and from Bombay to London. The defendants pleaded that the policy was not caused to be made by, or on behalf of, the plaintiff. These pleas were held bad on special demurrer, as amounting to non assumpsit. Supposing that case to be law to its full extent, yet if the plaintiff had joined issue, and gone to trial upon that plea, though Boggs, Taylor & Co. were not agents at the time of the contract, a subsequent ratification of their act would have been sufficient. [TINDAL, C. J. If your position is well founded, that would be so in whatever way the defendants pleaded. The question would be, whether a subsequent ratification will render a contract valid. It would not, as you seem to think, depend upon the course of pleading.]

The objection that the plea involves a negative pregnant, *is answered by the cases of *Bell v. Tuckett*, antè, Vol. III., p. 785, 4 Scott, N. R. 402, and *Michael v. Myers*, antè, Vol. VI., p. 702, 7 Scott, N. R. 444, 1 Dowl. & L. 792. [*469]

The sixth plea, which is founded upon the 5 & 6 W. 4, cc. 19, 32, (b) shows that the voyage was illegal, and that the vessel was not seaworthy. The plea states such a contravention of the statute as disentitles the plaintiff to sue on the policy; and any informality in the statement of this defence could only have been a ground of special demurrer. The preamble discloses the scope of the whole act. The object of the second section is, that both the seamen and the master shall have the benefit of articles; and it prohibits the master of any ship therein described, from carrying to sea any seaman without first entering into those articles. [COLTMAN, J. It is not said that it shall not be lawful to carry out any ship. The objection would be the same if one seaman only omitted to sign the articles.] There would be this difference, that the omission as to one seaman would not make the vessel unseaworthy. It is in effect the same, as if the legislature had said,

(a) Vide *Wilson v. Tumman*, antè, Vol. VI. 236.
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(b) Suprà, 466, n., 461, n.
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that it shall not be lawful for a vessel to go to sea. The master could not take his vessel out without seamen. The defendants do not contend that the omission of the signature of one seaman, or that a mere informality in the articles of agreement, would render the voyage illegal. The plea here alleges the number of seamen engaged, and that not one of them had signed. In *Smart v. Powell*, Lord TENTERDEN, C. J., assumes that the policy and the voyage would have been illegal, if an excuse for a non-compliance with the requisitions of the 6 G. 4, c. 109, had not been established in evidence. In *Law v. Hollingsworth*, 7 T. R. 160, a ship bound to

*470] 5 G. 2, c. 20, and dropped him before she reached her moorings in the Thames; after which, before she was safely moored, the vessel was lost; and it was held that the underwriters on ship and cargo were discharged by reason of there not being any pilot on board at the time of the accident; though the loss was not directly imputable to want of skill in those who navigated the vessel. Lord KENYON, C. J., in giving judgment, said, "The principle on which this case must be determined, seems to be admitted on all hands, namely, that the assured cannot recover on a policy of assurance, unless they equip the ship with every thing necessary to her navigation during the voyage; the ship herself must be seaworthy, she must have a sufficient crew, and a captain and pilot of competent skill. It is one of the things implied in contracts of this kind, that there shall be some person on board the ship, apparently qualified to navigate her. If the underwriters had been previously informed that there would be no pilot on board during the ship's sailing up the river Thames, probably they would not have undertaken the risk." Thus also in a case in which the captain did not perform his duty; and in which it might be said—if the underwriters had been informed that the ship was going out without one sailor on board who was under articles, they might not have undertaken the risk. *Law v. Hollingsworth* was brought before the court of Exchequer Chamber in *Sadler v. Dixon*, 8 M. & W. 895, and TINDAL, C. J., remarked—"The decision of that case may be maintainable, on the ground of an implied warranty to observe the positive requisitions of an act of parliament." So here, the voyage, being in express contravention of an act of parliament, was illegal.

*471] "But if this were not so, or if the illegality of the voyage would not affect the policy, the plea amounts to a plea of unseaworthiness, though informally pleaded; and the allegation of illegality may be rejected as surplusage. Sailing without a competent number of seamen properly qualified renders the ship unseaworthy. In *Clifford v. Hunter*, Moo. & Malk. 103, 3 C. & P. 16, an insurance on a vessel which had not a crew sufficient to meet the ordinary contingencies of a voyage, was held to be void. In that case the defect was that there was no one able to do the duties of the captain if he should be ill. *Tait v. Levi*, 14 East, 481; *Law v. Hollingsworth*. If the crew of the *Brigand* had been properly retained under

articles, there would have been an encouragement to them to perform their duty, and a remedy against them in case of desertion. The master went to sea incurring a penalty for which he might have been sued in any port he put into; and he had no specific remedy against the seamen in case of desertion. He, therefore, had not a competent crew. This species of unseaworthiness is not within the general rule that seaworthiness at the inception of the risk is sufficient; *Hollingworth v. Brodrick*, 7 A. & E. 40. There is an obvious difference between the non-execution of the articles of agreement as to one single seaman and non-execution by the whole crew. It is immaterial that this is a time policy.

Channell, Serjt., was stopped by the court.

TINDAL, C. J. The second plea in this case puts in issue the allegation in the declaration that "the said policy of insurance was so made by the said H. & J. Johnstone & Co. as aforesaid, as the agents for him, the plaintiff, and on his account, and for his, the plaintiff's, *use and bene- [*472 fit; and that the said H. & J. Johnstone & Co. did receive the order for, and effect, the said policy of insurance as such agents as aforesaid." To this plea the plaintiff has demurred; and he has assigned as cause of demurrer, that it amounts to the general issue. And that is the legal effect of this traverse. The plea of non assumpsit puts in issue, not merely the promise, but also the consideration for such promise. Let us, then, consider whether the same facts are not virtually traversed by the second plea. It appears on the face of the declaration that the plaintiff, by H. & J. Johnstone & Co., "the plaintiff's agents in that behalf, caused to be made a certain policy of insurance purporting thereby and containing therein that the said H. & J. Johnstone & Co., as well in their own name as for and in the name or names of all and every person or persons to whom the same did, might, or should appertain, in part or in all, did make assurance and cause themselves and them, and every of them, to be assured with the defendants."(a) It appears, therefore, on the face of the declaration that the policy was effected in the name of *H. & J. Johnstone & Co., [*473 as agents for the plaintiff, and, upon the face of the policy, that it was effected by them as agents for the parties interested. The consideration is thus stated—"that in consideration that the plaintiff, at the request of the defendants, had then paid to the defendants a certain sum of money

(a) The 28 G. 3, c. 56, which repeals the 25 G. 3, c. 44, enacts, (sect. 1,) "that it shall not be lawful for any person or persons to make or effect, or cause to be made or effected, any policy or policies of assurance on any ship, &c., or upon any goods, &c., without first inserting, or causing to be inserted, in such policy or policies the name or names, or the actual style and firm of dealing, of one or more of persons interested in such assurance; or without, instead thereof, first inserting or causing to be inserted in such policy or policies the name or names of the usual style and firm of dealing of the consignor or consignors, consignee or consignees of the goods, &c., so to be insured; or the name or names, or the usual style and firm of dealing, of the person or persons residing in Great Britain who receive the order for and effect such policy or policies, or of the person or persons who give the order or direction to the agent or agents immediately employed to negotiate or effect such policy or policies."

Sect. 2 enacts, "that every policy and policies made or underwrote contrary to the true intent and meaning of this act, shall be null and void to all intents and purposes whatsoever."

as a premium for the insurance of 3000*l.* of and upon the premises in the policy mentioned, and had then promised the defendants to perform and fulfil all things in the said policy contained on the part and behalf of the assured to be performed and fulfilled, the defendants promised." On issue joined upon a plea of non assumpsit, the plaintiff must have produced the policy as set out in the declaration, and must have shown that it had been effected by H. & J. Johnstone & Co., as his agents. It seems to me, therefore, that the same facts would have been receivable in evidence under that plea as under the precise traverse presented by the second plea. It is said that there may be a distinction as to the evidence admissible under this plea and under non assumpsit; that, under the latter, a subsequent recognition of Johnstone and Co.'s agency may be given in evidence, but that, under the second plea, these persons must be shown to have been agents at the time the policy was effected. I think that no such distinction exists; and that if a subsequent recognition would be available in the one case it would be so in the other. *Sutherland v. Pratt* was cited on the part of the plaintiff. That case cannot, as it seems to me, be distinguished from the present, but is an authority completely in point. As far, therefore, as the second plea is concerned, I think that the demurrer ought to prevail, and that there must be judgment for the plaintiff.

Under the sixth plea the defence set up is, that the policy was effected *474] upon a voyage which was illegal, as *being contrary to the provisions of the statute 5 & 6 W. 4, c. 19. A policy on an illegal voyage cannot be enforced; for it would be singular, if, the original contract being invalid and therefore incapable to be enforced, a collateral contract founded upon it could be enforced. It may be laid down, therefore, as a general rule, that, where a voyage is illegal, an insurance upon such voyage is invalid. This has been decided in many cases. Thus, during the war, policies effected on vessels sailing in contravention of convoy acts (a) were held void. (b) So, where the voyage was against the provisions of the East India Company acts, (c) or the South Sea Company acts, (d) or the general navigation act; (e) which statutes were made with reference to the general policy of the realm. But it appears to me that the 5 & 6 W. 4, c. 19, was passed for a collateral purpose only; its intention being to give to merchant-seamen a readier mode of enforcing their contracts and to prevent their being imposed upon. The present case is undoubtedly brought within the provisions of the first section of this statute by the allegations contained in the sixth plea. The fourth section enacts that if the master do not comply with the previous requisitions, he shall be liable to a penalty; but it

(a) 38 G. 3, c. 76, 43 G. 3, c. 57.

(b) See *Wainhouse v. Cowie*, 4 Taunt. 178; *Darby v. Newton*, 6 Taunt. 544, 2 Marsh. 252.

(c) 9 & 10 W. 3, c. 44, 33 G. 3, c. 52. See *Johnston v. Sutton*, 1 Dougl. 254; *Camden v. Anderson*, 5 T. R. 709, 6 T. R. 723, 1 B. & P. 272; *Chalmers v. Bell*, 3 B. & P. 604.

(d) 9 Ann. c. 2, 42 G. 3, c. 77, 47 G. 3, st. 1, c. 23. And see *Toulmin v. Anderson*, 1 Taunt. 227; *Hodson v. Fullarton*, 4 Taunt. 787.

(e) 6 G. 4, c. 109.

is nowhere said that such non-compliance shall make the voyage illegal; the section merely provides a remedy against the master. Neither can I consider this as a case of unseaworthiness. The cases cited were cases in which there was an incompetent crew; but there is nothing here to show that the crew *was not both sufficient and competent. I think, therefore, the sixth plea is also bad, and that thereon also our judgment must be for the plaintiff. [*475]

COLTMAN, J. The first question raised in this case depends upon the application of the new rules of pleading, R. H. T. 4 W. 4, ss. 1, and 3, to the defendant's second plea. And that question is, whether this must be taken as a plea in confession and avoidance, or as a plea showing the contract declared upon to be void or voidable in point of law. If the contract had been entered into by the principal, it would clearly have been put in issue by the plea of non assumpsit; and it appears to me that the authority of the agent being involved in the question of the existence of the contract, such authority is put in issue by the plea of non assumpsit.

The sixth plea raises a question as to the legality of the voyage insured, by alleging that the captain omitted to comply with the requisitions of the 5 & 6 W. 4, c. 19. The contract of insurance was not originally illegal; but it is suggested that something has occurred which renders the voyage illegal. The question then, in effect, is, whether the statute prohibits all voyages where its provisions are not observed—a question to be determined upon the language of the statute and the nature of those provisions. The captain is forbidden to take out seamen who are not under articles. The argument must go this length—that if one seaman belonging to this vessel, has not signed the articles, the whole voyage will be illegal. The object of the legislature was to protect seamen from imposition. The articles are to be read over to every seaman before he signs; and it imposes a specific penalty upon the master for any default. All this is for the benefit of the seamen.

It has been contended that the non-compliance with the requisitions of the statute renders a vessel *unseaworthy.(a) No case has been cited that sustains that proposition; nor has it been attempted to be shown that the crew were not perfectly competent to the duties which they had to perform. [*476]

Per curiam;(b)

Judgment for the plaintiff.(c)

(a) And therefore no obligation is laid on a seaman suing for wages, to produce the articles or to give notice to the captain or owner to produce them, *Bowman v. Manzelman*, 2 Campb. 315. And if, in such action, any objection is meant to be founded upon the articles, they must be produced by the defendant. *Ibid*.

(b) Cresswell, J., was sitting at nisi prius.

(c) And see *Hinckley v. Walton*, 3 Taunt. 131; *Wilson v. Foderingham*, 1 Maule & Selw. 468; *Armstrong v. Lewis*, in error, 2 C. & M. 274, 4 Moo. & Sc. 1.

EMERSON v. BROWN. May 25.

Unless it be distinctly shown that process has not come to the knowledge of a defendant, the court will not set aside proceedings, upon a statement that the defendant has not been served with, or had notice of, the process.

BYLES, Serjt., in Easter term last, obtained a rule calling upon the plaintiff to show cause why the appearance entered for the defendant and all subsequent proceedings had thereon, should not be set aside for irregularity, with costs, on the ground that the defendant had not been served with the writ of summons.

The affidavits of the daughter and the son-in-law of the defendant, stated that the defendant was ninety-one years of age, and confined to his bed-room; that, on the 17th of April last, the plaintiff and one Jacobs came to the house of the son-in-law, (with whom the defendant resided,) at Marston, in the county of Bedford, where they spent the night; that on the following morning they requested an interview with the defendant, alleging that the *477] plaintiff wished to pay him a *quarter's rent of certain premises which he held as tenant to the defendant; that the son-in-law permitted them to go into the defendant's bed-room for the purpose of having such an interview; that the daughter and son-in-law were both present all the time, but did not observe any writ or copy of any writ, served on the defendant, either by the plaintiff or by Jacobs, nor did they believe that any such writ or copy was then served, nor was any action against the defendant mentioned or alluded to during the interview; that, after the plaintiff and Jacobs had left the defendant's bed-room, the daughter found on the table an envelope containing a copy of a writ of summons against the defendant at the suit of the plaintiff; that such copy was not produced to, or brought to the knowledge of the defendant, at the interview, nor did the daughter mention to her father the circumstance of such copy having been left, until several days afterwards. The defendant also swore, that, on the 27th of April last, he was served with a notice purporting that a declaration had been filed against him in an action of covenant at the suit of the plaintiff; that previously to the service of the said notice, he was not aware that any action had been commenced against him by the plaintiff; that he was never served with any writ of summons, or a copy of any writ of summons, or any other writ, in any such action, nor had he had notice of any proceedings in the action save and except the said notice of the declaration having been filed therein; and that he never received any letter or notice from the plaintiff or his attorney communicating the intention of the plaintiff to commence this action against him.

Talfourd, Serjt., now showed cause. His affidavits stated, that, a writ of summons having been issued against the defendant at the suit of the plaintiff, and a *difficulty being anticipated in effecting the service thereof, *478] it was arranged that the plaintiff and one Jacobs should proceed to

Marston and endeavour to obtain an interview with the defendant; that they accordingly went on the 17th of April last, and, after spending the night at the house, on the following morning obtained an introduction into the defendant's bed-room under pretence of paying him some rent; that, whilst they were in the bed-room, *Jacobs personally served the defendant with a copy of the writ of summons*, by giving the same into the right hand of the defendant, in an envelope without seal or wafer, in the presence of the plaintiff and the daughter and son-in-law of the defendant; that, on their leaving the bed-room and going down to the parlour, they were followed by the son-in-law, who addressed them thus—"Two pretty fellows you are to serve the poor old man in this manner after the way in which you have been treated: many better men than you have been hung. If I had known that you intended to serve that thing on the poor old man, you should not have seen him, and I would have broken your necks down the stairs"—and ordered them out of the house; that Jacobs remaining for a receipt for the rent, whilst the plaintiff went to the stable to get his horse, the defendant's son-in-law, after some further abusive language, said: "I should not have minded your serving the poor old man, if it had not been for the nasty way in which you did it; after sleeping here, and being treated in the way you have been."

It is submitted that a complete answer has been given to the affidavits on which this rule was obtained: and, at any rate, the court will not interfere where there are such conflicting statements. In *Rhodes v. Innes*, 5 M. & P. 153, 7 Bingh. 329, 1 Dowl. P. C. 215, the plaintiff's attorney delivered a letter containing the *copy of a writ to the defendant's son [479 at the defendant's house, who said his father was in the house, and he promised to give it to him. The defendant moved to set aside the proceedings, on the ground that he had never been served with process; but it was held that the service on the son was equivalent to a service on the father. TINDAL, C. J., there said: "There is no magic in the word *personal*, and if a party by his conduct or agreement chooses to waive personal service, a service less strict may be sufficient." And in *Morris v. Coles*, 2 Dowl. P. C. 79, it was held, that, upon a motion to set aside the service of a summons, however positively the defendant and his witnesses may swear to negative the personal service, yet, if it is left in doubt by the affidavits on the other side whether there was sufficient service or not, the court will not interfere—Lord LYNCHURST, C. B., observing: "How can we enter into a controversy upon these facts? In making a motion of this sort, the rule is, you must rely on the strength of your own case: it is impossible to say, on these affidavits, whether you were served or not." Here, the service is positively sworn to by two witnesses; and it is clear that the writ came to the knowledge of the defendant, or to the knowledge of persons acting for him, in his presence.

Byles, Serjt., in support of his rule. The defendant's affidavits stands wholly uncontradicted. The statements on the other side are all consistent

with the fact of the copy never having come to his hands. Suppose a copy of a writ had been handed to him shut up in a book without any thing being said, could it be held to be good service? If at the time a writ is handed to a party, any artifice is used to conceal that it is a writ, it is impossible to *480] say that there has been a sufficient service. If *what passed on this occasion is held good service, a service hereafter must be considered sufficient, although care is taken effectually to conceal from the person served the nature of the paper delivered to him. What is sworn to on the other side does not amount to service. It is perfectly consistent with the plaintiff's affidavits that the writ never came to the hands of the defendant, that he never saw it, or had any knowledge of its contents. It is distinctly stated in the affidavits on the part of the defendant that nothing was said. [TINDAL, C. J. If a man, having an opportunity of seeing what he is served with, does not choose to look at it, that is virtually a personal service. His son-in-law goes down stairs and mentions it.] *His* knowledge is not enough. He might be an agent, but the statute requires personal service of the writ. A man cannot depute another to receive a writ for him.

TINDAL, C. J. I think that the circumstances of this case called on the defendant for an explicit denial that he knew he had been served with a copy of the writ.

CRESSWELL, J. The defendant does not swear that he did not know that the copy of the writ of summons was left with him in the manner deposed to on the other side; he does not say that he did not know that such a document was left in the envelope. He cautiously and guardedly speaks of *notice and service*.

Per Curiam;

Rule discharged, with costs.

*481] *BURGESS v. BOETEFEUR and BROWN. May 24.

By a statute, (25 G. 2, c. 36, s. 5.) if two inhabitants of any parish give notice to a constable of any person keeping a disorderly house in such parish, the constable is to go with such inhabitants to a justice of the peace, and upon their entering into a recognisance to produce material evidence against such person, is to enter into a recognisance to prosecute with effect such person at the next sessions; and such constable is to be allowed all reasonable expenses of such prosecution, to be ascertained by two justices, and is to be paid the same by the overseers of such parish; and in case such person be *convicted*, the overseers are forthwith to pay 10*l.* to each of such inhabitants; and in case such overseers neglect or refuse to pay, upon demand, the said sums of 10*l.* and 10*l.*, such overseers, and each of them, are to forfeit to the person entitled to the same, double the sum so refused or neglected to be paid.

In an action by A., an inhabitant of X., against C. and D., as overseers, to recover a penalty under this statute, it appeared that A., and another inhabitant B., had given the requisite notices with respect to a disorderly house kept by E., and that E. was prosecuted and pleaded guilty, while F. and G. were overseers of the parish; and that after C. and D. came into office, E. was called up for judgment and sentenced. A. thereupon demanded in writing the sum of 10*l.* from C. and D., but they refused to pay it. There were churchwardens in the parish, but no demand had been made upon them.

Held, that E. was not to be considered as *convicted* until the judgment of the court upon the

indictment against him was pronounced; (a) and therefore that the demand for the reward was properly made upon, and the action rightly brought against, C. and D., and that their predecessors F. and G. were not liable.

Held, also, that no objection having been taken to the form of the demand either at the trial or on obtaining a rule nisi to enter a nonsuit, it was too late to do so upon the argument in support of such rule.

Held, also, that it was not necessary that such demand should be in writing.

Held, also, that it was not necessary to make the demand upon the churchwardens as well as upon C. and D., the overseers, or to join the former in the action; and that the action was well brought against the latter, upon whom the demand was made.

Quarr, whether churchwardens are included in the term "overseers" in the statute, so as to be liable to be called upon to pay the reward.

The defendants having made an admission, for the purpose of the cause, that they were "the overseers" at the time the demand in question was made; *semble*, that they were not thereby precluded from contending that the churchwardens were also overseers, and should have been joined in the demand.

DEBT. The first count of the declaration stated that the defendants, on, &c., were, &c., indebted to the plaintiff in the sum of 20*l.*, being forfeited by an act, "for the better preventing thefts and robberies, and for regulating places of public entertainment, and punishing persons keeping disorderly houses," whereby, and by force of the statute in that case made and provided, an action accrued to the plaintiff to demand and have of and from the defendants the said sum of 20*l.*, parcel, &c. There were two other similar counts, in each of which a like sum was claimed.

Plea, *nil debent*.(b)

At the trial, before COLTMAN, J., at the sittings for Westminster, during last Hilary term, the following facts appeared.

The plaintiff was an inhabitant of the parish of Paddington, in which the defendants were the overseers of the poor for the year 1843—1844. On the 6th of September, 1842, the plaintiff, and one Falkus, another inhabitant of the same parish, gave the following notice to William Wallis the constable of the parish, and to John Watson and William Charles Carbonell, the then overseers of the poor thereof, in pursuance of the statutes 25 G. 2, c. 36, s. 5, (c) and 58 G. 3, c. 70, s. 7.(d)

(a) And see *Rez v. Bridger*, 1 M. & W. 145; *Regina v. Whitehead*, 2 Moody Crown Cases Reserved, 181.

(b) See *Faulkner v. Chevell*, 5 Ad. & E. 213, 6 N. & M. 704, 10 Ad. & E. 76, 2 P. & D. 262; *Earl Spencer v. Swannell*, 3 M. & W. 154; *Jones v. Williams*, 4 M. & W. 375; *The Edinburgh and Leith Railway Co. v. Hibblewhite*, 6 M. & W. 707; *Castleman v. Hicks*, 2 Moo. & R. 422.

(c) 25 G. 2, c. 36, s. 5, "in order to encourage prosecutions against persons keeping bawdy-houses, gaming-houses, or other disorderly houses," enacts, "that if any two inhabitants of any parish or place, paying scot and bearing lot therein, do give notice in writing to any constable (or other peace-officer of the like nature, where there is no constable) of such parish or place, of any person keeping a bawdy-house, gaming-house, or any other disorderly house in such parish or place; the constable or such officer as aforesaid so receiving such notice, shall forthwith go with such inhabitants to one of his majesty's justices of the peace for the county, city, riding, division, or liberty in which such parish or place does lie, and shall, upon such inhabitants making oath before such justice that they do believe the contents of such notice to be true, and entering into a recognisance in the penal sum of 20*l.* each to give or produce material evidence against such person for such offence, enter into a recognisance in the penal sum of 30*l.* to prosecute with effect such person for such offence at the next general or quarter sessions of the peace, or at the next assizes, to be holden for the county in which such parish or place doth lie, as the said justice shall deem meet; and such constable or other officer shall be allowed all the reasonable expenses of such prosecution, to be ascertained by any two justices of

(d) For note (d) see the following page.

*483] : Middlesex, to wit.—To William Wallis, constable of the parish of Paddington, in the county of Middlesex, and within the metropolitan-police district, and to John Watson and William Charles Carbonell, overseers of the poor of the said parish; We, Wharfe Burgess, of No. 22
 *484] Frederick Street, in the said parish, and John Falkus, of No. 19 Frederick Street aforesaid, two of the inhabitants of the said parish, paying scot and bearing lot therein, do give you, and each of you, notice that James Mitchell, of the said parish, doth keep a disorderly house in the said parish, to wit, at a messuage and premises situate No. 17 Frederick Street, in the said parish; and we do hereby require you, the said constable and overseers, forthwith to go with us, before some one of her Majesty's justices of the peace in and for the said county, to the intent that such proceedings may be had for the prosecution of the said James Mitchell for the said offence, as in and by a statute made and passed in the twenty-fifth year of the reign of the late King George the Second, intituled, &c., and also in and by a statute made and passed in the fifty-eighth year of the reign of his late Majesty George the Third, are directed and required. As witness our hands, this 6th day of September, 1842.

(Signed)

"WHARFE BURGESS.

"JOHN FALKUS."

Two other similar notices were given in respect of other parties.

Watson and Carbonell having declined to interfere in the prosecution, the plaintiff and Falkus, and Wallis, the constable, attended before a magistrate, and respectively entered into the recognisances required by the former statute, the former, to give or produce material evidence against the parties, and the latter, to prosecute them with effect at the next general sessions for Middlesex, held in October, 1842. Indictments were accordingly prepared against the parties, and they severally pleaded guilty. The judgment was respited that the nuisances might in the mean time be abated; and this having been done, the parties were afterwards (in June, 1843) brought up for

the peace of the county, city, riding, division, or liberty where the offence shall have been committed, and shall be paid the same by the overseers of the poor of such parish or place; and in case such person shall be convicted of such offence, the overseers of the poor of such parish or place shall forthwith pay the sum of 10*l.* to each of such inhabitants; and in case such overseers shall neglect or refuse to pay to such constable or other officer the expenses of the prosecution as aforesaid, or shall neglect or refuse to pay, upon demand, the sums of 10*l.* and 10*l.*, such overseers, and each of them, shall forfeit to the person entitled to the same double the sum so refused or neglected to be paid."

(*d*) 58 G. 3, c. 70, s. 7, after reciting the 25 G. 2, c. 36, s. 5, enacts, "that a copy of the notice which shall be given to such constable, shall also be served on, or left at the places of abode of, the overseers of the poor of such parish or place, or one of them; and such overseers or overseer of the poor shall be summoned or have reasonable notice to attend before such justice of the peace before whom such constable shall have notice to attend; and if such overseers or overseer of the poor shall then and there enter into such recognisances to prosecute such offence as the constable is in and by the said act required to enter into, then it shall not be necessary for, nor shall a constable be required, to enter into such recognisance; but if such overseers or overseer of the poor shall neglect to attend such justice on having such notice, or shall attend and shall decline or refuse to enter into such recognisance to prosecute, then such constable shall enter into the same and shall prosecute, and shall be entitled to his expenses, to be allowed as in and by the said act is directed."

judgment, when they were each fined 1s. and discharged. Before this time,—viz., at Easter, 1843,—the defendants *were appointed [*485 overseers of the poor of the parish. The costs of the prosecutions were afterwards settled by the magistrates, and paid by the defendants to Wallis.

In November, 1843, the plaintiffs and Falkus served three notices of demand upon the defendants; of one of which the following is a copy.

“To Alexander Boetefeur and Charles Brown, overseers of the poor of the parish of Paddington, in the county of Middlesex :

“Whereas, Wharfe Burgess, of, &c., and John Falkus, of, &c., being on the 6th day of September, in the year of our Lord 1842, and still being, two of the inhabitants of the said parish, paying scot and bearing lot therein, did give notice in writing to William Wallis, then constable of the same parish, and serve the like notice on John Watson and William Charles Carbonell, or one of them, they the said John Watson and William Charles Carbonell then being overseers of the poor of the said parish, that James Mitchell did keep a disorderly house in the said parish, to wit, at a messuage situate No. 17 Frederick Street, in the parish aforesaid, and we did thereby require the said John Watson and William Charles Carbonell, and also the said constable, forthwith to go with us before one of her majesty’s justices of the peace in and for the said county, to the intent that such proceedings might be had for the prosecution of the said James Mitchell for the said offence, as in and by a statute made and passed in the twenty-fifth year of the reign of the late King George the Second, intituled, &c., ‘and also in and by a statute made and passed in the fifty-eighth year of the reign of his late majesty King George the Third, are directed and required : and whereas the said constable did, a reasonable time after such notice from us, namely, on the 8th day of September in the year aforesaid, attend with us before George Long, Esq., then being one of her majesty’s justices of peace in and for *the said county, and one of the police-magistrates [*486 of the metropolis, then sitting at the police-court, Marylebone, in the said county, and within the metropolitan-police district ; and the said John Watson and William Charles Carbonell, or one of them, having had reasonable notice to attend before such justice, both neglected to attend such justice ; and upon us and each of us the said Wharfe Burgess and John Falkus making oath before the said justice, that we did believe the contents of the said first-mentioned notices to be true, and entering into a recognisance in the penal sum of 20*l.* each, to give, or produce, material evidence against the said James Mitchell for such offence, the said constable did enter into the recognisance required by the said statute of George the Second, to prosecute with effect the said James Mitchell for such offence, at the next general session of the peace to be holden in and for the said county, as to the said justice did then seem meet : and whereas the said constable did accordingly prosecute the said James Mitchell for such offence at the said session, and the said James Mitchell was thereupon convicted

of such offence: now, I the said Wharfe Burgess, as such inhabitant as aforesaid, do hereby demand of you the said Alexander Boetefeur and Charles Brown, as such overseers as above mentioned, the sum of 10*l.*, and require you forthwith to pay the same to me, to which sum I am entitled by virtue of the statutes aforesaid, or one of them; and I the said John Falkus, as such inhabitant as aforesaid, do also demand of you as such overseers, and require you forthwith to pay to me, other 10*l.*, to which I also am entitled as aforesaid. Dated this 4th day of November, in the year of our Lord 1843.

(Signed) "WHARFE BURGESS.

"JOHN FALKUS."

The money not having been paid by the defendants in pursuance of these notices, the present action was *brought in the following December,
 *487] in order to recover the penalties.

The following admissions were put in on the part of the defendants:— That on the 6th September, 1842, Wallis was constable of the parish, having been duly appointed to serve as such between Easter, 1842, and Easter, 1843; that Watson and Carbonell were on the 6th September overseers of the poor of the parish, having been duly appointed to serve as such, from Easter, 1842, to Easter, 1843: that on the said 6th September the plaintiff and Falkus were inhabitants of the parish, paying scot and bearing lot therein: that the defendants were the then overseers of the parish duly appointed, and were such on the 4th November, 1843.

The attorney who conducted the prosecutions was called as a witness, and stated that he was employed by Wallis; that he made the necessary advances from time to time at Wallis's request, who had generally attended to the business; but that he was also employed by the plaintiff and Falkus, who were his regular clients, to watch their interests, and that he had looked to them for payment of his expenses. He had received however 40*l.* from Wallis, out of the money paid to him by the overseers.

Wallis was also called as a witness; and he stated that he had conducted the prosecutions, had taken a very active part in them, and had subpoenaed the witnesses. He stated, also, that he was not used to the conducting of prosecutions, and had asked the attorney for the plaintiff and Falkus to assist him, and that he appeared before the grand jury as prosecutor; but he admitted, on cross examination, that he was not consulted as to the bringing of the parties up for judgment.

It was also proved, on the part of the defendants, that there were two churchwardens for the parish; and *that no notice of demand had
 *488] been served upon them or either of them.

It was objected on the part of the defendants,—first, that the action did not lie against the present defendants, as they were not the overseers at the time of the *conviction* of Mitchell and the other parties;—which, it was contended, took place at the time they pleaded guilty, when Watson and Carbonell were overseers—secondly, that if the *judgment* were to be taken as the conviction, still there should have been a demand upon the church

wardens as well as upon the overseers—and, thirdly, it was urged that there was no evidence to show that Wallis had been the prosecutor of the indictments; but that they had really been prosecuted by the plaintiff and Falkus; and upon this point *Clarke v. Rice*, 1 B. & Ald. 694, was cited. The learned judge overruled the objections, reserving leave to the defendants to move to enter a nonsuit upon the two first points; and he left it for the jury to say, whether or not the prosecutions had been conducted by Wallis; whereupon the plaintiff obtained a verdict for the sum claimed, 60*l*.

Bompas, Serjt., in last Hilary term, moved to enter a nonsuit, pursuant to the leave reserved, and also for a new trial for misdirection, upon the ground that the learned judge had left it to the jury to say whether Wallis was the prosecutor; and that the verdict was against the evidence. A rule nisi being granted,

Byles, Serjt., (with whom was *Corrie*,) now showed cause. The notice of demand was properly made upon the present defendants, and the present action was rightly brought against them, and not their predecessors in office. The 25 G. 2, c. 36, s. 5, provides that in case *the person prosecuted [*489 “shall be convicted of such offence, the overseers of the poor of such parish or place shall forthwith pay the sum of 10*l*. to each of such inhabitants.” The subsequent act does not affect the case. [CRESSWELL, J. It may perhaps be said, that it was the intention of the later act to give to the parties, who by the former act are made responsible for the penalty, the option to prosecute; and that the present defendants had not that option, inasmuch as they were not in office at the time the prosecutions were commenced.] Still the main question will be—who were the overseers at the time the parties were *convicted*? If the term “conviction” means *judgment*, then the conviction in this case occurred in the time of the present defendants; if, on the other hand, it means, as it often does in popular, and sometimes even in legal, language, a verdict or confession—then the further question will arise whether “the overseers” mentioned in the act mean the overseers for the time being, that is, at the time of such verdict—or those who are in office at the time of the demand. The act does not limit any time within which such demand is to be made. It is true that in *Sutton v. Bishop*, 4 Burr. 2283, 1 W. Bla. 665, the court appears to have drawn a distinction between civil and criminal cases; and though they decided that in the former, a verdict was nothing without a judgment, yet they seemed to think that in the latter a verdict might amount to a conviction before judgment. The facts of that case were very singular. Bishop, the defendant, had received a bribe of five guineas from one Earle. In order to indemnify himself, he determined to discover Earle, so as to avail himself of the eighth section of the bribery act (2 G. 2, c. 24), which enacts, “That if any person offending against this act shall, within the space *of [*490 twelve months next after such election as aforesaid, discover any other person or persons offending against this act, so that such person or persons so discovered be thereupon *convicted*, such person so discovering,

and not having been before that time convicted of any offence against this act, shall be indemnified and discharged from all penalties and disabilities which he shall then have incurred by any offence against this act." Accordingly, upon Bishop's statement an action was brought under that act, by one Bingley against Earle. Two months afterwards an action by Sutton against Bishop was brought, under the same section, for taking the bribe. Both causes were set down for trial upon the same day; but the cause of *Sutton v. Bishop* standing first, was taken in order, and a verdict was found against the defendant; a verdict was also found against the defendant in the other cause of *Bingley v. Earle*, in which Bishop was examined as a witness for the plaintiff. And all that the court determined was, that the verdict in these actions did not amount to a conviction; but, considering that Bishop was entitled to his indemnity, they thought that Bingley ought to be at liberty to enter up his judgment against Earle; and for this reason they proposed by a special rule, particularizing the circumstances of the case, and staying the execution of Sutton's judgment against Bishop. And it is remarkable that the penalty might have been recovered, according to the provisions of sect. 1 of that act, by "*information*," as well as by "*action of debt*;" and the same reasons, as to a bare verdict not amounting to a conviction, would apply equally to both proceedings. So, in *Lee v. Gansel*, Cowp. 1,—upon an objection that an affidavit could not be read because the defendant stood convicted of perjury, and the conviction was produced,

*491] —Lord MANSFIELD, C. J., said, "A conviction upon a charge of perjury is not sufficient, unless followed by a judgment. I know of no case where a conviction alone has been an objection: because, upon a motion in arrest of judgment, it may be quashed." It is plain his lordship was using the word *conviction* in the popular sense. A plea of *autrefois convict* could not be proved otherwise than by the production of the judgment-roll, with the judgment entered thereon. (a) The stat. 7 & 8 G. 4, c. 23, s. 11, enacts that where a party is indicted after a previous conviction, a certificate, containing the substance and effect only (omitting the formal part) of the indictment and *conviction* for the previous felony, purporting to be signed by the clerk of the court, &c., shall be sufficient evidence of the first conviction; and in *Reg. v. Ackroyd*, 1 Car. & K. 158, CRESSWELL, J., rejected a certificate upon the ground that it omitted to state any judgment. [CRESSWELL, J. I understand that such certificates have been received by other judges.] If a verdict or confession is to be considered as equivalent to a conviction, it would give rise to much inconvenience, and might open a door to fraud. The bill in this case might have been found by the grand jury in the court of Queen's Bench: or the indictment might have been removed there by certiorari; in which case there might have been a new trial, and an acquittal after what is termed the previous conviction, or the judgment might have been arrested. The over-

(a) So as to a plea of *autrefois acquit*. See 2 Phill. Ev. 141, 9th ed., and cases there cited.

seers are required by the act to pay the constable's expenses; and he is to enter into a recognisance "to prosecute with effect;" but he is not entitled to his expenses until he has obtained a perfect conviction. [CRESSWELL, J. Would his recognisances be forfeited if the jury *acquitted the party?] Perhaps not. [CRESSWELL, J. Then it is clear that the constable *could* "prosecute with effect" without obtaining a conviction.] As the act says that his expenses are to be ascertained by two justices of the county, &c., "where the *offence* shall have been *committed*;" it might perhaps be said, that if there was no conviction there was no offence committed, and therefore that in such a case the constable would not be entitled to his expenses.

Secondly, if the term *convicted* would be satisfied by a verdict or the confession of a party, the other side will still have to contend that if the 10*l.* and the expenses are not recovered in the time of the overseers who were in office when the proceedings were instituted, they cannot be recovered at all. But it is submitted that they are a charge upon the parish funds, as the parish has the benefit of the prosecution. It could not be intended that the money was to be paid out of the overseers' own pockets. In all books upon the poor-law, it is laid down that the overseers may pay out of the poor-rate any sums they are ordered to pay by any act of parliament. [COLTMAN, J. Is this point in dispute? *Channell*, Serjt., (who supported the rule.) Not as to the 10*l.*; but it is submitted that the 20*l.*, which is a penalty, cannot be considered as a charge upon the parish funds.] At any rate the constable's expenses, where he is entitled to them, will also form a charge upon the parish funds; that is to say, they may be paid out of the rates. Suppose the overseers have no money in hand at the time the demand is made, they cannot pay the sum out of their own pockets, and make a rate to reimburse themselves; such a rate, if the facts appeared upon the face of it, would be bad as being retrospective. [CRESSWELL, J. Are not the overseers bound to have sufficient money in hand?] They cannot anticipate every possible contingency. [COLTMAN, J. What *is to prevent them from making a rate for the express purpose?] In such case they must wait till the new rate is made. And if they may wait for one rate, why may they not wait for a second, so that the delay is not unreasonable? There may be more urgent payments to be made. The 10*l.* may become due just before *Easter*, when the overseers go out of office, or the trial may take place when A. and B. are overseers, and the conviction may not take place till they have gone out and C. and D. are in office; in such cases is the inhabitant to lose his claim? There seems no necessity why the officers, who have had the option to prosecute, should be the parties required to make the payment; though, probably, the overseers upon whom the demand is made must be the same parties as those against whom the action is brought. [CRESSWELL, J. Suppose a demand is made, and the overseers have no money in hand, and say they cannot pay—when does the right of action accrue? It may take a month to make a

rate and levy it. The act says, if the overseers "shall neglect or *refuse* to pay." It is submitted there would be no neglect or refusal in such a case. The words "neglect or refuse" must apply to a case where the overseer has an opportunity of complying with the demand.

The other side will perhaps rely upon the expression in the act, that the overseers shall "forthwith" pay the 10*l*. But the word "forthwith" does not mean at the next moment of time. It means—within a convenient time; in the same manner as when an appeal is directed to be entered at the "next sessions," it means the next practicable sessions. "Forthwith" has the same meaning as "immediately;" and in *Pybus v. Mitford*, 2 Lev. 77, the word "*immediate*" was construed to mean "such convenient time as is reasonably requisite for doing the thing." That case was *494] cited, and the same principle adopted by the court of King's Bench in *Rex v. Francis*, Ca. temp. Hardw. 113, 2 Stra. 1015. [TINDAL, C. J. There is no doubt the word "forthwith" means with all reasonable celerity.

Thirdly, as to the absence of any demand on the churchwardens. The objection is, not that they are not joined in the action,—that would be merely ground for a plea in abatement,—but that the churchwardens, being *ex officio* overseers, the demand should have been made upon them jointly with the other overseers. But the other side are not entitled to go into this objection; for, by the admissions made in the cause, it is conceded that the defendants were *the overseers* of the poor duly appointed. The declaration is special, and the defendants must have known that the plaintiff was proceeding under the 25 G. 2, c. 36, and 58 G. 3, c. 70. If those acts include churchwardens, *cadit questio*; if they do not, it is admitted that the defendants are the overseers.

But, assuming the point to be still open to the defendants, it is submitted that the term "overseers" in these acts does not include churchwardens. The 43 Eliz. c. 2, s. 1, constitutes churchwardens *ex officio* overseers, and enacts that they "shall be called overseers;" but, in that very act, the term "overseers" frequently excludes churchwardens, as in sect. 2, where the "churchwardens, *and* overseers" are required to do certain acts; and there is the same form of expression in sects. 4, 5, and several others. [TINDAL, C. J. Does that carry the case any further? It may be a mere pleonasm, and the word "churchwardens" may be added for greater security.] The duties imposed by the statutes under consideration are more properly cast upon overseers than churchwardens, the latter being in the nature of ecclesiastical officers. In the interpretation clause of the *495] poor-law amendment act, 4 & 5 W. 4, c. 76, s. 109, it is enacted, "that the word 'overseers' shall be construed to mean and include (*inter alios*) churchwardens;" which would not have been necessary if the term "overseers," &c. had *ex vi termini* included churchwardens. By the same section an "assistant overseer" is to be included in the term "overseer," which clearly would not have been the case without such an enact

ment. It must therefore at least have been thought doubtful by the legislature whether the word "overseers" included churchwardens. In the pawnbrokers' act, 39 & 40 G. 3, c. 99, s. 28, both churchwardens and overseers are mentioned. In the act, commonly known as Michael Angelo Taylor's act, 57 G. 3, c. xxix., mention is made of "churchwardens or overseers;" "overseers" cannot mean "churchwardens" there. [TINDAL, C. J. Perhaps in that case we ought to read "and" for "or."] By the 59 G. 3, c. 12, s. 7, parishes are empowered to appoint assistant overseers, who are authorized to execute all the duties of overseers as expressed in the warrant of appointment, "in like manner, and as fully, to all intents and purposes, as the same might be executed by any ordinary overseer of the poor." That expression could not be intended to include churchwardens. If the meaning of the statutes under which the present action is brought is equivocal, the court will not incline to a construction which would impose a liability upon public officers. The demand in this case was made upon the overseers, and not upon the churchwardens; and the action is therefore properly brought against the former. Even if the demand *might* have been made upon the churchwardens, it is sufficient that it was made upon the parties who are now sued. A demand upon any one overseer would probably have been sufficient, provided he were the party sued. Otherwise, if there were twenty parochial officers, no action could be maintained if the service of the demand on any one of them had been defective.* In *The King v. The Justices of Warwickshire*, 6 Ad. & E. 873, 2 N. & P. 153, service of the grounds of appeal upon one of the officers of the respondent parish was held good under the 4 & 5 W. 4, c. 76, s. 81, although that act requires the overseers of the appellant parish to "send or deliver to the overseers of the respondent parish a statement in writing," &c. *The King v. The Justices of Norfolk*, 2 B. & Ad. 944, is to the like effect. It is not necessary to contend that a demand upon one overseer would make all the parish officers liable; but it is submitted that a demand upon one will make that one liable. The words of the fifth section of the 25 G. 2, c. 36, are, "such overseers and each of them shall forfeit," &c. This may mean that each overseer shall be liable to the full penalty, or, as is more probable, that each shall be liable for the penalty incurred by the whole body.

Lastly, there was no misdirection, and the jury came to a right conclusion. It was properly left to them to say by whom the prosecution was conducted; and upon the evidence of the constable, they were satisfied that it was conducted by him. In *Clarke v. Rice*, 1 B. & A. 694, the notice stated the prosecution to have been carried on by the inhabitants.

Channell, Serjt., (with whom was F. V. Lee,) in support of the rule. The present action is not maintainable against these defendants; if maintainable at all, it should have been brought against the former officers. The provision contained in the 58 G. 3, c. 70, s. 7, must be taken as if it was incor-

porated with the 25 G. 2, c. 36, s. 5. The effect of the two enactments is, that upon two inhabitants of a parish giving notice to the constable and *497] overseers of a disorderly house being kept, they, *the inhabitants, constable and overseers, are to attend before a magistrate, whereupon the inhabitants making oath of the truth of their notice, and entering into a recognisance to produce material evidence against the party, the overseers are also to enter into a recognisance to prosecute such party if they think fit, or, if not, the constable is to do so.

The question turns upon the words of the former act. "And in case such person shall be convicted, the overseers of the poor of such parish or place shall forthwith pay the sum of 10*l.* to each of such inhabitants," &c. These words do not include overseers appointed subsequently to the time when the legal conviction took place. It is not necessary to contend, that if a change of officers took place between the offence and the conviction of the offender, the later overseers would not be liable; but it is submitted that the conviction in this case was when the parties pleaded guilty. The distinction between civil and criminal cases adverted to by the court, in *Sutton v. Bishop*, is well founded. The question there, and in the other cases that have been referred to, was as to the means of proving the fact of a conviction. It is not necessary in this case to contend that the conviction could be *proved* without producing the record. Here, the conviction was, in fact, proved by the production of the judgment; but the time when the judgment was entered of record is immaterial to the question when the conviction took place; the entry of the judgment cannot alter the time of the conviction. [COLTMAN, J. You contend that a plaintiff is entitled to recover the 10*l.* immediately upon the confession of the party; and that he must recover against the overseers who are in office during the year in which the conviction takes place. But it may be, as in this case, that no judgment was entered during that year, although there was a verdict against the party. *498] What proof, then, that *a conviction had taken place would the plaintiff have against the first set of overseers, if it was necessary to produce the judgment? Perhaps you are putting it more unfavourably against yourself than necessary. If conviction means a verdict or confession, it might be proved without producing the judgment.] Undoubtedly it might; in the same manner as, where it is only necessary to prove the fact of a trial at nisi prius, the production of the postea is sufficient. In *Lee v. Gansel*, Cowp. 1, Lord MANSFIELD took a distinction between a conviction and a judgment in a case of perjury; though he ruled that the production of the conviction without the judgment was not sufficient to show that the party had been convicted, so as to render him incompetent as a witness. In *Reg. v. Ackroyd*, 1 Carr. & K. 158, all that the learned judge probably intended to decide was, that the prosecutor had not given either the statute or common law proof of a previous conviction. [CRESSWELL, J. What I intended to decide was this—that a mere verdict of guilty was not sufficient to show that the prisoner had been convicted. Otherwise this might

follow.—A point of law might be reserved; a verdict of guilty would be recorded; but the judges might think the conviction wrong; whereupon a free pardon would be granted. And yet if proof of the verdict would prove a conviction, the party would, on a second trial, be liable to the higher scale of punishment imposed by the 7 & 8 G. 4, c. 28.] In 4 Bla. Com. it is said, p. 355, “If the jury find him guilty, he is then said to be *convicted* of the crime whereof he stands indicted. Which *conviction* may accrue two ways; either by his confessing the offence and pleading guilty; or by his being found so by the verdict of his country.” [TINDAL, C. J. The word “conviction” is used in two senses. The question is, how it is used in the statute before us? It *is pretty clear what would be the [499 meaning of the term in a plea of *auterfoits convict*.](a) In cases of acquittal no formal judgment is entered. [TINDAL, C. J. It would be if it was necessary to produce the record of acquittal. The entry of judgment would be, that the party go thereof without day.] Still it would not be necessary to produce the record containing such entry in order to support a plea of *auterfoits acquit*. It would be sufficient to prove the fact of acquittal.(b) A party may not be allowed to take advantage of a verdict unless he shows by the judgment that the verdict stands. But that is a very different case from the present. Here, the inhabitants are clearly not the prosecutors; they are per recordum only bound to give material evidence. If they do that, and a verdict of guilty follows, they have nothing further to do, and are entitled to the reward. Suppose the prosecutor, or the court, did not think fit to bring the party up for judgment, the inhabitants ought not to lose their reward. [COLTMAN, J. The two inhabitants have the same power to compel the constable to bring the party up for judgment, as they have to compel him to prosecute. He is under a recognisance to *prosecute with effect*. And they might apply to have his recognisance estreated.] That would be no benefit to them, unless, by the grace of the crown, the recognisance was estreated *to their advantage. [TINDAL, C. J. So [500 that you would say the overseers or the constable might, by connivance, always prevent the inhabitants from recovering the reward.] That would be the result. The constable, moreover, is to have his expenses paid, though the inhabitants should fail in producing sufficient evidence, and he is to be paid “by the overseers;” this must certainly mean the overseers at the time the complaint is preferred. Then surely it cannot be meant that the overseers who are to pay the 10*l.* should be those who come into office afterwards. [TINDAL, C. J. I cannot see why the overseers

(a) This occurs in the prayer of judgment, “*si iterum de eadem morte de qua semel convictus est, responders compelli debeat.*” The plea of *auterfoits convict* sets out the judgment, if any has been given; but before the abolition of *beneficium clericale* it might have been alleged that the defendant had had his clergy, 2 Hawk. P. C. 375, or that he had prayed his clergy, and that the court had taken time to consider whether it should be allowed; *Bligh v. Holcroft*, Co. Ent. 53 b. Pleas of *auterfoits acquit*, *auterfoits convict*, or *auterfoits attain*, set out the former proceedings, without making any direct allegation that the party was acquitted, convicted, or attainted.

(b) The plea of *auterfoits acquit* sets out the judgment *quod eat inde sine die*, and concludes with a *proul patet per recordum*. 2 Staundf. P. C. 105, Com. Dig. tit. *Appeal* (G 11).

who are to pay the constable, may not be different from those who are to pay the 10*l*. The latter sum is clearly not to be paid till after conviction ; but the constable may be a needy man, and require to be fed with money from time to time.] The statute does not point out any duty to be performed by the inhabitants after verdict, though many acts are to be done by them before that event. It seems more just that the overseers who received the statutory notice, should be the parties to make the payment ; but the present defendants were not overseers either at the time when the complaint was made or when the trial took place, and the verdict was obtained. [TINDAL, C. J. The question is, which set of overseers are to pay ? The parties who were overseers at the time of the trial are not to keep the money in their purse till the time of the judgment. Surely they would not be allowed to do that.] *Clarke v. Rice* is an authority for two points—first, that the inhabitants are not the prosecutors of such an indictment ; and, secondly, that there must be a proper demand upon the overseers, and an improper refusal by them, before any liability attaches to them. [CRESSWELL, J. The demand in that case stated the prosecution to have been conducted by the inhabitants ; as it had been, in point of fact. It was not *501] shown, therefore, that any *prosecution which entitled the parties to a reward had taken place.] The case, at any rate, shows that the demand must be one which the overseers are bound to obey. Now, what is the demand here ? It is addressed to the two defendants, and is to this effect :—Whereas we, two inhabitants, on the 6th of September, 1842, gave notice to the constable and the overseers for the time being—your predecessors in office—that J. M. kept a disorderly house ; and your predecessors did not attend before the magistrate, but the constable prosecuted the said J. M. at the next sessions, who was *thereupon* convicted. Surely that must mean that he was convicted during the time of their predecessors. At any rate, the notice should have stated that the judgment had been respited. [COLTMAN, J. That objection was not taken at the trial, though possibly it may still be open to you.] If the defendants should fail in establishing that they are not liable at all, it must surely be open to them to contend they were entitled to such a notice as would show they were bound to pay. [CRESSWELL, J. If the objection had been taken on moving for the rule nisi, it might have been answered that the only point insisted upon by the defendants at the trial was, that the conviction took place in the time of their predecessors. TINDAL, C. J. This point was not mentioned when the motion was made. The other side has not been heard upon it.] The plaintiff is bound to satisfy the court that there has been a proper demand. [TINDAL, C. J. If the objection had been taken at the trial it might have turned out that there had been a sufficient demand. I do not know that the demand need be in writing. A demand may have been made in conversation.]

Secondly, as to the necessity of the demand being made upon the churchwardens as well as upon the overseers. The churchwardens are overseers

of the poor by virtue of their office. They were so before the *statute of Elizabeth was passed, though new overseers were then associated with them. Suppose there were three churchwardens and one overseer in a parish, as a rate must be made by the majority of the whole body, if the three churchwardens dissented, the one overseer could not make a rate. In the same manner there is no default by any one overseer, unless there be a default by all; and there can be no such default unless there have been a demand on all. It is said that a service of notice of appeal upon one overseer is sufficient; but the object in that case is not to make the overseers liable to a penalty; and the notice should, at least, be addressed to all of them. But here, the demand is upon two only, by name: it cannot therefore be considered as an application to all. As churchwardens are overseers for the purpose of making a rate, they must have a control over the fund, and the payments to be made out of it. The statutes that have been referred to have no application. The words "churchwardens and overseers" were only introduced for greater caution. In *The King v. The Justices of Warwickshire*, and *The King v. The Justices of Norfolk*, the question was as to the sufficiency of the service of notice. [CRESSWELL, J. In *The King v. The Justices of Norfolk*, the notice of appeal, which was stated to be against the overseers' accounts, was addressed to the overseers only, and no notice was given to the churchwardens; and it was held that, as the latter had no account to keep, they were not entitled to notice as joint overseers with the former.] The appeal in that case was entered as an appeal against the accounts of the churchwardens and overseers; but the variance between the appeal and the notice was held to be immaterial. [CRESSWELL, J. You do not put it as a case of contract and non-joinder?] No.

As to the effect of the admission; its object was merely to describe the defendants as being the persons who, in *the popular sense of the term, were the overseers; and there is nothing in it to preclude them from contending that there were other official overseers besides themselves. [*502]

Upon the last point the question is, whether there was any evidence to show that *Wallis* was the prosecutor. The observations of BAYLEY, J., in *Clarke v. Rice*, are very strong upon this point.

TINDAL, C. J. This case comes before us upon a motion for a nonsuit, or for a new trial, upon the ground that there was no evidence to support one of the material allegations in the declaration.

Three grounds have been urged for setting aside the verdict; first, that the action is brought against the wrong overseers, inasmuch as the penalty was incurred by, and should be enforced against, the parties who were overseers in the year 1842; secondly, that the demand served upon the present defendants was insufficient and improper in point of form; and, thirdly, that the churchwardens of the parish being also overseers, should have been joined in the demand.

The first of these appears to be the main and principal ground of objection. The action is brought upon the stat. 25 G. 2, c. 36, s. 5, against the defendants as overseers of the poor of the parish of Paddington, for that a demand having been made upon them by the plaintiff for the sum of 10*l*. which had become due from them under the provisions of that statute, they neglected to pay him that amount, whereby an additional sum of 10*l*. might be enforced against them. I say the action is brought upon that statute, because, although the subsequent act (58 G. 3, c. 70, s. 7) puts it in the power of the overseers, upon notice given to them, themselves to prosecute any party keeping a disorderly house, yet if they think proper to decline *504] doing so, the prosecution *goes on under the provisions of the former act; and in this case, the overseers did so decline. (His lordship here, read the 25 G. 2, c. 36, s. 5.)

The first question then is, who were the overseers of the said parish at the time *the conviction* took place. The information was laid in the year 1842, when the parties prosecuted pleaded guilty. The defendants contend that the conviction took place at that time. The plaintiff, on the other hand, says that there was no conviction then, nor till the parties were subsequently brought up and received the sentence of the court. The word "conviction" is undoubtedly *verbum æquivocum*. It is sometimes used as meaning the *verdict* of a jury, and at other times, in its more strictly legal sense, for the *sentence* of the court. In the passages cited from Blackstone's Commentaries, the term seems to be used in both senses. The question is, in which sense is it used in the statute now under consideration. And I cannot but think that the case of *Sutton v. Bishop* is decisive of the point. The court there said, "Though there is a distinction in criminal cases between the conviction and attainder, yet there is no such distinction in civil cases between verdict and judgment, so as that any effect can follow from a naked verdict. In a civil action no penalty takes place till judgment be given on the verdict. The penalty is demanded as a debt, and is not due till the judgment is given. Any other construction would open the door to frauds. An offender would prosecute another to verdict, and therefore secure his own indemnity, and then proceed no further." Why does not the same reasoning apply to this case? If a verdict of a jury or a confession by the party were sufficient to satisfy the statute, a door would be equally open to fraud. So, again, the word "acquittal" is *verbum æquivocum*. *505] It is generally said that a party is acquitted by the *jury, but, in fact, the acquittal is by the judgment of the court. A plea of *autrefois convict* or *autrefois acquit* can only be supported by proof of a judgment. Then, as these defendants were the overseers at the time that the judgment of the court was pronounced, I think they are properly made defendants in this action.

The next objection is, that the demand is not a proper one on the face of it; inasmuch as it does not specifically show that the defendants were overseers at the time of the conviction. Whether that be so or not, I think

the defendants are not now in a situation to raise this objection. It was not made at the trial, or when the rule nisi was moved for, and it would be unjust to allow it now. It is not necessary that the demand should be in writing; and if the objections had been taken at the trial, it might have been shown that an objectionable demand had been made by word of mouth, or it might have appeared, from the conduct of the parties, that the defendants had waived the defect in the written demand.

The third objection is, as to the demand not having been made upon the *churchwardens*, and their not having been joined as defendants in the action. It is unnecessary to determine whether churchwardens are to be considered as overseers for all purposes; (a) because here, the act of parliament says, "in case such overseers shall neglect or refuse to pay upon demand the said sum, &c.; such overseers, and each of them, shall forfeit, to the person entitled to the same, double the sum so refused or neglected to be paid." This cannot mean that there is to be a separate penalty against each of the overseers; but it means that there may be a demand made upon any of them, and that the penalty is to attach in case of a refusal to make the payment so demanded. It is notorious that in some parishes, in which there are local acts, there are several overseers; and it would be [*506 quite beside the purpose of the statute to hold it necessary to serve a notice of demand upon each of them; especially as it might often happen that some of them would be absent from the parish. As the statute, therefore, imposes the penalty on the overseers neglecting or refusing to pay, and upon each of them, the fair construction appears to me to be, that if the demand is made upon those against whom the action is afterwards brought, it is sufficient. If the reward had been paid by any of the parochial officers upon whom no demand was made, or who were not joined as defendants, that would have been an answer on the merits to the action. But that is not the case here. I think, therefore, for these reasons, that the third ground of objection also fails.

As to the last objection,—which goes to a new trial being granted,—it has been urged that there was no evidence that the constable was the prosecutor of the indictment; and I agree, that if there were none, there ought to be a new trial: but I am of opinion that there was some evidence at least upon the subject from which the jury might draw the conclusion they did. (His lordship here recapitulated the leading facts given in evidence upon this point, *ut supra*, p. 487.) There was no evidence of collusion between the parties; and I cannot say that there was such an absence of all evidence to show that the constable was the prosecutor, as would justify us in sending down the case to another trial. It is said that such a case may be one of great hardship upon a parish; and undoubtedly a case may occur where wicked persons may combine for the purpose of obtaining the reward and putting the money in their own pockets, without any benefit

(a) See *Regina v. Justices of Cambridgeshire*, 7 A. & E. 480.

to the parish ; but such a fraud would vitiate the whole proceedings, *507] "and would be a ground for a prosecution for conspiracy against the parties concerned in it. Such a case is not very likely to occur, as the parish officers may always exercise the option of taking the prosecution into their own hands. Upon the whole, I am of opinion that the rule must be discharged.

COLTMAN, J. The first point in this case is, as to the meaning of the term "convicted" in the stat. 25 G. 2, c. 36, s. 5. If that term is satisfied by the mere verdict of a jury, or by the confession of the defendant, then the present action is brought against the wrong parties. But I agree that it must mean a conviction followed by a judgment ; the object of the statute being that the nuisance complained of should be abated ; and it is upon proving such a result that the inhabitants are to be entitled to the specified reward.

The second point is, that the demand is insufficient, as it does not show that the conviction took place in the time of the present defendants. No objection upon this point was taken at the trial ; and it does not, therefore, come properly before the court on the present occasion.

Upon the third point,—namely, whether the demand should not have been made upon the churchwardens as well as the overseers, and the action also brought against them,—I have felt some doubt and hesitation ; but, upon consideration, I think this action may well be maintained against the present defendants. The act of parliament says, "in case such person shall be convicted of such offence, the overseers of the poor of such parish or place shall forthwith pay the sum of 10*l.* to each of such inhabitants." It appears from this enactment that the duty of making the payment is put upon the whole body of overseers, possibly including the churchwardens.

*508] But that part of the enactment "does not give rise to the present action. The statute goes on to say, that, "in case such overseers shall neglect or refuse to pay upon demand the said sums of 10*l.* and 10*l.*, such overseers, and each of them, shall forfeit, to the person entitled to the same, double the sum so refused or neglected to be paid." The right of action, therefore, vests on the demand being made ; and I think it vests as against those parties only on whom the demand is made. The act says that "each of them" shall be liable to the penalty ; and I think it is not necessary to make the demand upon any parties but those against whom, in case of their refusal, it is intended to proceed. In that view a difficulty occurred to me as to whether the present action was not brought against more persons than ought to have been joined as defendants. It is clear, however, that not more than one sum is to be paid by way of penalty, and therefore all those upon whom the demand was made, may, I think, be joined as defendants.

Upon the other point, the question was certainly open on the evidence, whether the prosecution was conducted by the constable, or by the inhabit-

ants ; but that question was left to the jury ; and I see no reason to find fault with their verdict.

CRESSWELL, J. I am entirely of the same opinion. The first point in the case is, whether the overseers, who by the statute are made liable to pay the penalty, are the parties who are in office at the time that the judgment of the court is pronounced against the offenders. Whether we look at the language of the particular statute, or at that of other analogous statutes, I think this is the plain meaning of the legislature ; though, in expressing it, they have used, as my lord has remarked, the ambiguous word " convicted." The 10*l.* reward is given to the inhabitants—not for taking any *particular steps—but for conferring a benefit on the parish by putting down the nuisance of a disorderly house. They are not [509 entitled to any reward for going before the magistrate, or for being bound over to produce evidence at the trial, or for giving that evidence, or even for procuring a verdict, which may be set aside, or whereon the judgment may be arrested. The reward is due only for that which will enable the parish to abate the nuisance ; and, consequently, it is not to be paid till the *conviction* of the party by the *judgment* of the court. Rewards are often offered for apprehending an offender and prosecuting him *to conviction* : but this is always taken to mean a prosecution to judgment.(a)

Secondly ; as to the objection to the form of the demand, I agree that it comes too late. Had it been made at the trial, a conversation between the parties might have been proved, showing a waiver, on the part of the defendants, of any informality in the demand, if any existed, or a knowledge, on their part, of what was meant by the term " conviction."

Upon the third point, I own I had some doubt during the argument ; but I have none now, looking at the words in the latter part of the section under consideration. (His lordship read the section.) Admitting that this enactment may include the churchwardens under the term " overseers," the duty of paying the reward is cast upon all of them ; a performance of that duty by one would clearly operate as a discharge to all. But if the money is not paid, a demand may be made upon any number of them ; and if *they* refuse, they are liable to an action. This action, therefore, is *properly brought against those overseers upon whom the demand for [510 the reward was made, and who refused to pay it.

As to the new trial, I think it impossible to say that the question ought not to have been left to the jury. Rule discharged.(b)

(a) So, formerly, when a witness was objected to on the score of his having been convicted of an infamous crime, it was necessary to show the conviction by the production of judgment. See 1 Phill. Ev. 14, 16, 9th ed.

(b) And see 4 Bla. Comm. 380.

In the Matter of THOMAS HAIR, Gentleman, &c. *May 27.*

On a motion for judgment under the 6 & 7 Vict. c. 73, s. 43, the affidavit ought to be intituled in the matter of the attorney, and not in the name of the cause.

TALFOURD, Serjt., on a former day in this term, on behalf of Thomas Hair, moved for an order to enter up judgment under the forty-third section of the 6 & 7 Vict. c. 73, which enacts "that all applications made under that act to refer any such bill as aforesaid, (s. 37,) to be taxed and settled, and for the delivery of such bill, and for the delivering up of deeds, documents, and papers, *shall be made in the matter of such attorney or solicitor*; and that, upon the taxation and settlement of any such bill, the certificate of the officer by whom such bill shall be taxed, shall (unless set aside or altered by order, decree, or rule of court) be final and conclusive as to the amount thereof; and payment of the amount certified to be due and directed to be paid, may be enforced according to the course of the court in which such reference shall be made; and in case such reference shall be made in any court of common law, it shall be lawful for such court, or any judge thereof, to order judgment to be entered up for such amount, with costs, unless the retainer shall be disputed, or to make such other order thereon as such court or judge shall deem proper."

*511] *The affidavit being intituled "In the matter of Thomas Hair, gentleman, one of the attorneys of this court, and William Grant," the latter being the name of the client, it was objected by the master that the affidavit was not in conformity with the statute; and the application was refused.

The learned serjeant now renewed his motion upon an affidavit, omitting the latter words; and it was

Granted.

In the Matter of VALLANCE and BEIOLEY. *May 27.*

GREGORY v. The Duke of BRUNSWICK and Another.

On an application for an order under the 6 & 7 Vict. c. 73, s. 43, held that the affidavit might be intituled in the cause as well as in the matter of the attorney, the original order for taxation having been so intituled.

UNDER a judge's order, a bill of costs had been delivered by Messrs. Vallance and Beioley to his highness the Duke of Brunswick, containing, among other items, charges for defending an action brought by one Gregory against the duke and Vallance for an alleged conspiracy to prevent the plaintiff from acting at Covent-Garden Theatre, in which action Beioley's name appeared as the attorney for the defendants. On taxation, the master allowed *the whole* of the costs of the defence of that action; and on the 13th of April last an order was obtained by Vallance and Beioley at

chambers, under the 6 & 7 Vict. c. 73, s. 43,^(a) requiring the duke to pay the balance found due to them (708*l.* 18*s.* 8*d.*.) unless the court should grant a rule nisi to review the taxation within the first four days of the ensuing Easter term. *Byles*, Serjt., obtained a rule nisi for a reviewal of the taxation, on the ground that a sum of 80*l.* 10*s.*, alleged to have been disbursed by Vallance and Beioley at the request of the duke, had been improperly allowed, and also that Vallance was jointly liable with the duke for the costs of the defence of Gregory's action. Upon that rule coming on for argument on the 29th of April last, the whole matter was by consent referred to the master.

The master having certified that Vallance and Beioley were entitled to the full amount allowed upon the former taxation,

Talfourd, Serjt., now moved for an absolute order, whereon to found a judgment under the statute, 1 & 2 Vict. c. 110, s. 18.^(b) The judge's order was conditional; and it is apprehended that the parties are now in the same situation as if that order had been absolute. The court appears clearly to have power, under the forty-third section of the statute, to make the order.

On his attention being called to the manner in which the affidavit was intituled, the learned serjeant submitted that it was properly intituled in the matter of the attorneys, and also in the name of the cause of *Gregory v. The Duke of Brunswick and Another*, 6 & 7 Vict. c. 73, the order originally obtained for the delivery and taxation of the bill, as also the bill itself, having been so intituled.

The court were of opinion that the affidavit was correctly intituled; and the order

Was made.

^(a) *Antè*, p. 510.

^(b) And see *antè*, Vol. III. 407, 862; Vol. VI. 143, 149, 684, 689; 1 C. B. 133.

*FEARN v. FILICA. May 28.

[*513

A., in a letter to B., enclosed a bill drawn on B., and another bill drawn by C. on D. for the same amount. Before the letter arrived B. absconded, leaving a letter for E., authorizing him in B.'s name to endorse any bills which might be remitted to B., and to deliver such bills to F. or to negotiate them, and deliver the proceeds to F., against any liability F. might be under for B.'s account.

Held, that the authority only applied to bills remitted to B. as his own property; and that the bill drawn upon D., and which D. accepted, was not such a bill; and, therefore, that an endorsement thereof by E. in the name of B., gave no right of action to G., an innocent holder, against D., the acceptor.

Semle, that, if B. had himself endorsed the bill, an innocent holder might have sued upon it.

Quære, how far material allegations on the record, not traversed, are to be taken as admitted for the purpose of the cause. ^(a)

ASSUMPSIT, by an endorsee against the acceptor of a foreign bill of exchange for 300*l.* The declaration, after stating that certain persons using

^(a) See *Smith v. Martin*, 9 M. & W. 304; *Bonzi v. Stewart*, *antè*, Vol. IV. p. 295; *Goff v. Harris*, *antè*, Vol. V. p. 573; *Robins v. Maidstone*, 4 Q. B. 811; *Carter v. James*, 13 M. & W. 137.

the style of Felice Petracchi & Co., on the 9th September, 1843, by a person using the name of G. W. Jormenti, then being their procurator and agent in that behalf, made the bill and directed it to the defendant by the style of P. & N. Gandolfi & Co., making it payable to the order of certain persons using the style of Oneto & Reymond, to whom it was delivered; that it was accepted by the defendant, and endorsed by the payees; and, after certain mesne endorsements, that it was endorsed to Jean Pauli & Co., and alleged that they endorsed to certain persons using the style of Howard, Grand & Co., who then, by the said style of Howard, Grand & Co., endorsed the same bill to a person using the name of W. Lonergan, who endorsed to A. Daniels, who endorsed to the plaintiff.

Plea, traversing the allegation that the said persons using the style of Howard, Grand & Co., endorsed the bill to the said person using the name of W. Lonergan, *modo et formâ*. Whereupon issue was joined.

*514] *At the trial before COLTMAN, J., at the sittings for Middlesex after last Hilary term, the following facts appeared.

The bill in question was drawn and endorsed through mesne endorsements to John Pauli & Co., as stated in the declaration. In October, 1843, the last-mentioned firm having received a letter from one Grand, who carried on business in London under the firm of Howard, Grand & Co., wrote an answer, in which was contained the following passage:—

“We have drawn on you, gentlemen, for account E. 300*l.*, 11th instant. Iz. d. d. of Berbicer & Coneseus, 40/6½. \$7722·21 to your credit, franc courtage, value 13*z.* *Per contrà*, we remit you enclosed for the same account.

300*l.* 9 December. P. N. Gandolfi & Co.

40/4. \$7682·52 to your debit, franc courtage, value at sight.”

The bill in question was enclosed in this letter, which arrived at the counting-house of Howard, Grand & Co., on Monday the 16th October. Previously to its arrival, Grand absconded under circumstances of suspicion, and took his books with him, but he left persons at his office to transact business for him; at the same time he sent the following letter, addressed to Lonergan, to the counting-house of one Melchior Lopez, with a request that he would hand the same to Lonergan.

“London, October 13, 1843.

“SIR,—Our Mr. Grand will have occasion to-morrow to leave town for a few days upon urgent business. In his absence, we authorize you to open our letters; and we further hereby fully authorize and empower you, for us and in our name, to endorse any bill or bills of exchange *which may*
*515] *be remitted to us*, and to deliver such *bills of exchange to Mr. Melchior Lopez, or to negotiate such bills of exchange and to deliver the proceeds thereof to Mr. M. Lopez, against any liability he may be under for our account, or in which he may be interested.

“(Signed) HOWARD, GRAND & Co.”

This letter was forwarded by Lopez to Lonergan. They together opened the letter of Jean Pauli & Co., containing the bill on the day of its arrival; and on the same day Lonergan procured the defendant's acceptance to the bill. On the next day Lonergan, having at the request of Lopez, endorsed the bill both in the name of Howard, Grand & Co., and in his own name, handed it over to one Daniels to redeem certain wine-warrants belonging to Lopez, upon which, with his assent, he, Lonergan, had raised money for his own purposes. On the 20th, Daniels endorsed the bill to the plaintiff for a valuable consideration. An advertisement was issued offering 50*l.* reward for the apprehension of Grand, and on the 23d a fiat in bankruptcy was awarded against him. It was not shown that either Daniels or the plaintiff, at the time the bill was respectively endorsed to them, had notice of any act of bankruptcy by Grand.

On behalf of the defendant, it was contended that Lonergan was not authorized by the letter of the 13th October to endorse and negotiate the bill in the manner he did; as the letter must be considered as giving him only an authority so to deal with bills of which Howard, Grand & Co. were *bonâ fide* the owners, and that the bill in question never was their *bonâ fide* property, the draft against which it was remitted to them by Jean Pauli & Co. not having been accepted. It was further urged that Lonergan was merely authorized to apply the proceeds of those bills which he was empowered to endorse and negotiate in discharge of liabilities incurred by Lopez in connection with Howard, Grand & Co., and *not in satisfaction of his own debts; and that, at any rate, the authority to endorse was revoked by the bankruptcy of Grand. [*516]

The learned judge left it to the jury to say, first, whether the terms of the authority to endorse had been complied with, so as to render the endorsement valid; (a) secondly, whether an act of bankruptcy had been committed by Grand, before the endorsement of the bill by Lonergan, which would amount to a revocation of the authority, unless they thought the transaction, as regarded the plaintiff, was *bonâ fide*, within the 2 & 3, Vict. c. 29; in which case, the plaintiff would be entitled to recover, notwithstanding the bankruptcy.

The jury returned a verdict for the plaintiff for the amount of the bill and interest, finding specially that there had been *bonâ fides* on the part of the plaintiff, and that no act of bankruptcy had been committed by Grand before the endorsements.

Sir *Thomas Wilde*, Serjt., in last term, obtained a rule nisi for a new trial; first, on the ground of misdirection, in omitting to direct the jury, as matter of law, that the bill was never the property of Grand, and that the endorsement by Lonergan was not a due execution of the authority given to him, citing *Ramsbottom v. Lewis*, 1 Campb. 279; secondly, on the ground

(a) There being no contest as to what was done by the parties after the receipt of the letter, under its real or assumed authority, the first point seems to resolve itself into a question of law, upon the construction of the terms of a written instrument.

of the verdict being against the evidence, no act of bankruptcy having been committed by Grand.

Byles, Serjt., (with whom was *J. Atkinson*,) now showed cause. The first point raised on the other side is, whether *the bill in question
 *517] was Grand's bill. But this point is not open to discussion in the present state of the record. The declaration states that Jean Pauli & Co. endorsed the bill to Grand; and that statement, not being traversed, is admitted. The case set up on the other side is, that Jean Pauli & Co. endorsed to Grand in such a manner that the latter had no authority to endorse, unless he accepted the corresponding bill, and, therefore, that there was not such an endorsement to Grand as would authorize him to endorse to Loneragan; but that is, in effect, disputing the endorsement as alleged to have been made to Grand. It was undoubtedly laid down by ALDERSON, B., in *Edmunds v. Groves*, 2 M. & W. 642, 5 Dowl. P. C. 775, (a) that "the pleadings are not before the jury, but only the issue;" and, therefore, that "an admission in the record is merely a waiver of requiring proof of those parts of the record which are not denied, the party being content to rest his claim on the other facts in dispute; but if any inferences are to be drawn by the jury, they must have the facts from which such inferences are to be drawn proved, like any other facts." That doctrine, however, must be taken to be overruled by *Bingham v. Stanley*, 2 Q. B. 117, 1 G. & D. 237. It might be correct upon an issue in law; but on an issue in fact, the whole record is before the jury. [CRESWELL, J. I take it that what my brother ALDERSON meant was, that the fact put in issue was to be proved just as if no admission were made on the record; that is, that an admission in the record is not to be taken to prove the issue. TINDAL, C. J. The jury are only sworn to try the issue.] In *Edmunds v. Groves*, Lord ABINGER, C. B., as well as BOLLAND, B., expressed himself very guardedly upon the point. *Bennion v. Davison*, 3 M. & W. 179, where ALDERSON, B., repeated the
 *518] opinion *he gave in *Edmunds v. Groves*, was also before the court of Queen's Bench in *Bingham v. Stanley*, and disapproved of. [CRESWELL, J. If the rule is not as stated by ALDERSON, B., this singular state of circumstances might arise,—a counsel might ask the jury from the mere state of the record, to infer a fact which was directly in issue.] Probably no very great inconvenience would arise from such a course. In *Bennion v. Davison*, there was an immaterial allegation in the record, which was not traversed; and the defendant could not be put to the alternative of pleading a bad plea, or of admitting the statement on the record. [CRESWELL, J. In the case of an estoppel on the record, where one fact alone is traversed, and the issue thereon is found for the traverser, will he be bound in another action by the estoppel?] It is submitted that he will; as in the case of a declaration in covenant containing three breaches, two of which the defendant admits in his plea, traversing the third, upon which he succeeds. [CRESWELL, J. That would be a matter wholly unconnected

(a) And see the cases referred to, *supra*, 513.

with the two other breaches. It is not like a pleading containing a connected chain of facts.] The question could hardly arise since the new rules abolishing the use of the *protestando*. (a) If in action upon a bill of exchange, where the defendant has pleaded that the bill was given for a gaming consideration, the plaintiff replies that true it was that it was so given; in any subsequent action between the same parties or their privies, they will be estopped from disputing what they have thus expressly admitted. (b) Then, unless the decision in *Bingham v. Stanley* is correct, an admission will be less binding in the action in which it was made than it will be in a subsequent action *between the same parties. In *Bing-* [*519
ham v. Stanley the court were unanimously of opinion that an admission on the record was a fact to go to the jury. And unless this court is prepared to overrule that decision, there is a binding admission on this record that the bill in question was endorsed by Jean Pauli & Co. to Grand.

But, assuming that there is no such estoppel, and that it is open to the other side to dispute the endorsement to Grand, it is submitted that, under the facts proved, Grand might have endorsed the bill with his own hand, so as to give a title to the holder. The effect of the letter from Jean Pauli & Co. is this:—"endorse the bill we send, and give us your acceptance in return." If Grand had not accepted the latter bill, still, if he had endorsed the former, a *bonâ fide* holder would have obtained a title. [Sir *Thomas Wilde*, Serjt., admitted that would be so.] Then Grand might give a valid authority to an agent to endorse the bill for him. And the question is, whether Lonerger, as the agent of Grand, has not, under his authority, done what Grand himself was entitled to do. The letter of the 14th October contains these terms—"and we hereby fully authorize and empower you for us and in our name to endorse any bill or bills of exchange *which may be remitted to us*." [CRESWELL, J. Does that refer to their *actual* power or their *rightful* power?] To their actual power. The other side will contend that it does not extend to this bill; but it is admitted that Grand had the power to endorse it. [Sir *T. Wilde*, Serjt. The power, but not the right: If he had endorsed it he would have committed a gross fraud.] Still he had the power to endorse. The bill was, in fact, remitted to Grand: the fraud would have been, not in endorsing the bill remitted, but in not handing over the countervailing acceptance. Then, it is submitted, there was a good authority to *Lonerger to endorse; and [*520
the plaintiff, being a *bonâ fide* holder of the bill, without notice of any fraud, is entitled to recover upon it. At any rate, there is an admission on the record that there was an endorsement in fact from Jean Pauli & Co. to Grand. The evidence, therefore, as to the bankruptcy of Grand was inadmissible for the purpose of showing that he had no authority

(a) The rule of H. 4 W. 4 gives the party the benefit of the protestation without requiring an express reservation.

(b) And see *Veale v. Warner*, 1 Saund. 323 c; *Saunderson v. Collman*, ante, Vol. IV. p. 209.

to endorse over. This case is very distinguishable from *Marston v. Allen*, 8 M. & W. 494; where, to a declaration on a bill of exchange drawn by J. H., alleging that J. H. endorsed it to E. M., and E. M. endorsed it to the plaintiff, the defendant pleaded that J. H. did not endorse the bill to E. M. At the trial J. H. proved that he himself wrote his name at the back of the bill; that he had received it as accountant to the Imperial Bank, for a debt due to the bank, and that after writing his name upon it, he had delivered it to W. M., who was also employed by the bank. E. W. proved that he had received the bill from W. M., as he said, for value, and endorsed and delivered it for value to his father, the plaintiff. The defendant proposed to controvert this, and to show that both E. M. and the plaintiff received the bill with full knowledge of fraud committed by W. M. in handing over the bill. This evidence was rejected under the plea denying J. H.'s endorsement, and the plaintiff obtained a verdict: and it was held, on motion for a new trial, that the evidence tendered ought to have been received; as, if the facts stated had been fully proved, the jury ought to have found for the defendant on the issue that J. H. did not endorse the bill to E. M.; for, although there was an endorsement on the bill, there was no valid delivery by J. H., or by any authority from him, and so no complete transfer by endorsement to E. M. In this case there was a delivery *521] and a complete transfer of the bill. *Where a party is constituted, as in this case, a general agent, the principal cannot afterwards set up a limitation of the authority.

It will also be contended on the other side, that there was no good execution of the authority by Loneragan, because the proceeds of the bill were not properly disposed of. The authority consisted of two branches; and it is submitted that both were fulfilled. The bill was, in fact, endorsed and taken to Lopez, and was delivered into the hands of his nominee for his benefit; or it may be taken that the bill was negotiated, and the proceeds delivered to Lopez, such proceeds being the wine-warrants. But even supposing the authority not to have been strictly pursued with respect to the proceeds of the bill, a *bona fide* endorsee is not to suffer by that subsequent misconduct. If A. is directed to endorse a bill and hand the proceeds to B., and A. hands them to C., an innocent holder ought not to suffer. The appropriation of the proceeds took place after the endorsement; and what was done with those proceeds was therefore immaterial. The case might have been different if the question had arisen between the plaintiff and Grand; but here the question is between the plaintiff and the acceptor.

But then it is said the authority given by Grand was revoked by his bankruptcy, and that was the main point first insisted on at the trial on behalf of the defendant. But the jury have found there was no act of bankruptcy before the endorsement; and they were justified in so finding. The absconding was the only act relied upon; but there was nothing to show that Grand absented himself with intent to defeat or delay his creditors within the meaning of the bankrupt act. He left behind him some one to

ransact his business; and he appears to have gone away on account of some criminal charge, as a reward was offered for his apprehension. *Absence, under such circumstances, is not necessarily an act of bankruptcy; *Lingood v. Eade*, 1 Atk. 196; Com. Dig. tit. Bankrupt (C). [*522]

The principle on which an act of bankruptcy is held to amount to a revocation of authority, is, that all control over the bankrupt's property has, by relation to such act, passed to his assignees. At the moment of the endorsement to the plaintiff, the law implied a promise on the part of Grand to pay the plaintiff if the acceptor did not; and this would be a promise made, and a cause of action arising, *after* the act of bankruptcy. But even assuming the existence of a prior act of bankruptcy, the jury were properly directed that if the plaintiff was a *bonâ fide* holder, the transaction was protected by the 2 & 3 Vict. c. 29.

Sir *Thomas Wilde*, Serjt., (with whom was *Channell*, Serjt.,) in support of the rule. An act of bankruptcy was clearly committed by Grand. He absconded, leaving the letter for Loneran, which contained the authority in question. When the bill arrived enclosed in the letter from Jean Pauli & Co., Grand's commercial existence had ceased. The letter containing the bill was opened by Lopez and Loneran together. They are the only persons *dealing* with the bankrupt, within the meaning of the 2 & 3 Vict. c. 29. The authority to Loneran was applicable only to bills *belonging* to Howard, Grand & Co.; which bills were to be applied with reference to *their transactions* with Lopez. But the bill in question was in fact applied to Loneran's own purposes; as he paid his debt to Daniels with it, and redeemed the wine-warrants, which he, Loneran, had pledged as a security. Grand was not bound to accept the bill drawn by Jean Pauli & Co. It was a mere proposal from them, *which he might have adopted or rejected as he pleased; and no one was left with power to exercise the option for him. Jean Pauli & Co. might have demanded the restitution of the bill under the circumstances; and the way that Loneran dealt with it was all but larceny. (The learned serjt. was then stopped by the court.) [*523]

TINDAL, C. J. I confess it appears to me that these observations put an end to the case. The short question to be decided is, did the authority to endorse bills, given by Grand to Loneran, extend to the bill under consideration? If Grand had, with his own hand, endorsed this bill, the title thereto of any *bonâ fide* holder, could not have been disputed; but the endorsement not being made by his own hand, the question arises whether such endorsement was made within the authority given to Loneran. That authority is contained in the letter of the 13th October. (His lordship here read the letter.) Now, what is the fair meaning of the words used by the writer? Must he not be taken to mean to confine the authority to endorse, to bills remitted *as the property* of Howard, Grand & Co.? I think the words can bear no other construction. He speaks of "bills which may be

remitted to us." *Primâ facie*, that would mean,—bills remitted as our property;—but coupled with the subsequent part of the letter, as to the appropriation of the proceeds, it is clear the authority could only apply to bills which the firm had a right to appropriate. No other bills appear to have been contemplated but such as they would be *bonâ fide* holders of. What are the circumstances attending this bill? It is sent to Howard, Grand & Co. in a letter from Jean Pauli & Co. That letter shows that the bill was not remitted generally, for it proposes a transaction which Howard, Grand & Co. might adopt or not, at their election; and if they did not elect *524] to adopt it, they had no more right to appropriate *the bill than if they had picked it up in the street. (His lordship here read the letter from Jean Pauli & Co.) This letter contains an express and explicit appropriation of the bill remitted, to a particular purpose, namely, to meet another bill drawn on Howard, Grand & Co., in case they should accept the latter. But they never did accept that bill; and that fact was known to Loneragan. It seems to me, therefore, that he put the name of Howard, Grand & Co. upon the bill without any authority for so doing. The present holder has no right to maintain this action, but must look for his remedy to his immediate endorser.

COLTMAN, J. I am perfectly satisfied that I took an incorrect view of this case at the trial. It is clear that Howard, Grand & Co. never made the election proposed to them in the letter from Jean Pauli & Co., and till they did so, they had no right to apply the bill in question to their own use. The authority given to Loneragan, being only to endorse such bills as Howard, Grand & Co. might properly have applied to their own use, was not an authority to endorse the present bill. This renders it unnecessary to inquire into any circumstances bringing the case within the 2 & 3 Vict. c. 29; for, quite independently of the question of bankruptcy, I think Loneragan had no power to endorse the bill.

CRESSWELL, J. I am entirely of the same opinion. If Howard, Grand & Co. had themselves endorsed the bill, a *bonâ fide* holder would have been entitled to sue upon it; but the case is very different where they do not themselves endorse. The plaintiff cannot rely upon this as an actual endorsement by them; he is obliged to resort to the authority given by Grand to Loneragan. Then, looking at that authority, it is clear that the present *525] bill is not within its scope. It is not an authority *to Loneragan to commit a fraud. It is unnecessary to discuss the other points in the case. Rule absolute

CURLING v. ROBERTSON. *May 28.*

The court will not allow to the successful party in a cause the costs of examining a witness upon interrogatories, when such examination is not used at the trial.

BYLES, Serjt., moved for a review of taxation in this case. It appeared from the affidavits upon which the motion was made, that the action was brought for certain repairs done to a ship; that the captain, who was believed to be a material and necessary witness for the defendant, had been, *bonâ fide*, examined upon interrogatories on the part of the defendant; but that upon a consultation previous to the trial, it was not thought necessary to put in his examination, and consequently it was not produced in evidence. The defendant obtained a verdict; but the master, on the taxation of costs, refused to allow him the expenses of such examination.

The learned serjeant submitted that the costs of an examination, made *bonâ fide*, ought to be allowed, upon the same principle as the expenses of a witness who has been subpœnaed, but is not called at the trial. [CRESSWELL, J. The defendant obtains the examination of a witness under the compulsory process of the court; and having obtained it, he finds that it will not avail him. What right has he to charge the plaintiff with the expense of the proceeding?]

TINDAL, C. J. There may be no doubt that the defendant *bonâ fide* examined the witness, and that he *bonâ fide* abstained from using his examination; but *looking at the examination as a mere experiment, I cannot say that the master has done wrong in refusing the costs of it. [*526]

The other judges concurring,

The learned serjeant

Took nothing.

BULL v. BROWNLOW. *May 28.*

Personal service on the plaintiff of notice of a motion for the discharge of an insolvent debtor under the 48 G. 3, c. 123, s. 1, is not requisite.

CHANNELL, Serjt., moved that the defendant, who was in execution upon a judgment recovered against him by the plaintiff for a debt not exceeding 20*l.*, and who had thereupon lain in prison for twelve months, might be discharged out of custody as to such execution, pursuant to the 48 G. 3, c. 123, s. 1. Notice of the motion had been served on the 16th inst. on the daughter of the plaintiff at his dwelling-house; but it had not been upon the plaintiff personally.

TINDAL, C. J. I think the service is sufficient. Personal service is not requisite in such a case.(a)

Per curiam;

Rule absolute.

(a) *Sed vide Kelly v. Dickinson*, 1 Dowl. P. C. 546; *George v. Fry*, 4 Dowl. P. C. 273; *Gordon v. Twine*, *Ib.* 560; *Biddulph v. Gray*, 5 Dowl. P. C. 406; *Johnson v. Ruledge*, *Ib.* 579.

*527] *CUSEL and Another v. JUDAH DE JACOB PARIENTE.
May 28.

A feigned issue having been directed upon an interpleader rule, between A. and B., to try the right to certain goods, A. obtained a judge's order for the sale of the goods, and the proceeds were paid into court. The issue having been found against A.: *Held*, upon motion for the payment of the money out of court, that B. was entitled to the costs of the order for the sale and of the application to the court.

A FEIGNED issue, under the interpleader act, to try the right to certain goods, having been tried under an order of *ERSKINE, J.*, between one Jacob de Joseph Pariente and the assignees of the present defendant, such issue had been found in favour of the latter.

Shee, Serjt., now moved that the sum of 623*l.* 11*s.* 9*d.* (the proceeds of the sale of the goods, which had been paid into court, to abide the event of the trial of the issue) might be paid out of court to the assignees or their attorney, and that Jacob de Joseph Pariente should pay the costs of the several applications to the judge under the interpleader act, together with the costs of the issue and of this application.

Byles, Serjt., showed cause in the first instance, and submitted that, at any rate, neither the costs of a rule obtained for the sale of the property ought to be included, nor those of the present application.

Shee, Serjt., in support of the rule, stated that the unsuccessful claimant had obtained a rule for a new trial, pending which he himself had obtained the rule for the sheriff to sell.

TINDAL, C. J. It is very difficult to suggest a difference between that step and any other in the cause; they all arise from the claimant's having made what turns out to have been a false claim. The simpler course is to include all the costs.
 Rule absolute.

*528] *SNOOKS v. SMITH. *May 29.*

A judge's certificate (under the 1 W. 4, c. 7, s. 2) that execution shall issue "forthwith," means in the ordinary course of the office; and the court refused to allow the plaintiff to sign judgment before the expiration of four days after the trial.^(a)
 The proper course would have been to apply to the judge who tried the cause.

SHEE, Serjt., applied for leave to sign judgment in this case, which had been tried at the sittings for Westminster this day, and in which, the plaintiff having recovered a verdict, the learned judge before whom the cause was tried had certified that execution should issue forthwith. The learned serjeant suggested that if the rule were not granted, the certificate for speedy

^(a) The rule is different in the case of a writ of inquiry under 8 & 9 W. 3, c. 11, or of writ of trial, in which cases, in the absence of a certificate by the sheriff, &c., judgment may be signed and execution issued on the day of the inquiry or trial. See 3 & 4 W. 4, c. 42, s. 18 and *Nicholls v. Chambers*, 1 C., M. & R. 385, 4 Tyrwh. 836, 2 Dowl. P. C. 693.

execution would be of no avail, as the defendant's goods were to be sold the following day.

TINDAL, C. J. (after consulting the master.) The term "forthwith" means as soon as execution can be obtained in the ordinary course of the court. It appears that four days are allowed in the ordinary course of the office for signing judgment. You come to the wrong forum; you should apply at chambers to the judge who tried the cause. We cannot give you speedier execution than he has done.

The learned serjeant

Took nothing.

*BROOKS and Another v. HODSON. May 27. [*529

An irregular *fi. fa.* cannot be amended to the prejudice of the intervening rights of assignees. Goods are taken on the 1st of March under *fi. fa.* upon an irregular judgment: on the 15th a fiat is awarded against the execution-debtor, and assignees are chosen on the 12th of April; the judgment-roll is carried in on the 19th of April.

A motion on the 25th to set aside the proceedings was held not to be made too late.

Semble, that an order for staying proceedings upon payment of debt and costs on a given day, is not within the 1 & 2 Vict. c. 110, s. 9.

IN an action of debt, a writ of summons, issued on the 23d of February, 1844, was served on the 24th at Leominster, in the county of Hereford, the sum endorsed being 145*l.* 14*s.* 4*d.* debt, and 2*l.* 10*s.* costs.

The defendant on the same day signed the following consent:—

"In the Common Pleas.

"Brooks and Another v. Hodson.

"I, the defendant, do consent to a judge's order to stay proceedings herein on payment by me of debt 145*l.* 14*s.* 4*d.*, and costs 2*l.* 10*s.*, as agreed, as follows—the costs down; 80*l.* part of the debt, on the 28th of February instant; 70*l.* on the 28th of March next; and the remainder of the debt, by instalments of 70*l.*, payable on the 28th of every succeeding month, until the whole be paid; and that, in case of default in any one payment, judgment may be signed, and execution issue, for the balance of debt then due. Dated, the 24th of February, 1844."

On the same day the order was obtained, and judgment was signed. On the first of March the goods of the defendant were taken by the sheriff of Herefordshire for 139*l.* 15*s.* 6*d.*, under a *fi. fa.* issued on the 29th of February. The goods so taken were sold on the 7th of March, and several days following.

The writ of *fi. fa.* commanded the sheriff to cause to be made of the goods of the defendant, "as well a certain debt of 4800*l.*, which Thomas Brooks and William *Wightwick lately, in Our court before Our justices at Westminster, recovered against him, as also 6*l.* 17*s.*, [*530 which, in Our same court, were awarded to Brooks and Wightwick for their damages which they had sustained as well by reason of detaining the said debt as for their costs and charges by them about their suit in that

behalf expended," &c. By the endorsement the sheriff was directed to levy "for debt and costs, 1390*l.* 15*s.* 6*d.*, *fi. fa.* 1*l.*, with interest on 1390*l.* 15*s.* 6*d.* beside poundage, officer's fees, and other incidental expenses."

The judge's order was as follows:—

"In the Common Pleas.

"Brooks and Another v. Hodson.

"By consent of the plaintiffs, attorneys, and the defendant, I order, that, upon payment of 1452*l.* 14*s.* 4*d.*, the debt due from the defendant to the plaintiffs, for which this action is brought, together with 2*l.* 10*s.* costs, as agreed, as follows, viz. the costs down, 80*l.*, part of the debt, on the 28th day of February instant, 70*l.* on the 28th of March next, and the remainder of the debt by instalments of 70*l.* payable on the 28th of every succeeding month, until the whole be paid, all further proceedings in this cause be stayed. And I further order, that, in case default be made in payment as aforesaid, the plaintiffs be at liberty to sign final judgment, and issue execution for the whole amount then unpaid, with costs of judgment and execution, sheriff's poundage, officer's fees, and all other incidental expenses, whether by *fi. fa.* or *capias ad satisfaciendum*. Dated, the 24th of February, 1844. T. ERSKINE."

On the 15th of March, a fiat in bankruptcy was awarded against the defendant, who on the 4th of April was duly declared a bankrupt. The acts of bankruptcy were committed on the 12th and 13th of March.

On the 12th of April, Henry Woodhouse and Thomas How were chosen assignees; and on the 13th, the sheriff had notice that they claimed the proceeds of the levy.

Upon affidavits stating these facts, and that the defendant signed the consent upon the assurance of the brother of the plaintiff Brooks, that the same was not to be made use of or put in force against him, unless and until some other creditors of the defendant should take proceedings against him, and that he would not have signed the same upon any other conditions or undertaking whatever; that, at the time such consent was so obtained from the defendant, no more was due to the plaintiffs than 720*l.* 18*s.* 4*d.*, the defendant having accepted bills for the residue of the debt, which had not arrived at maturity; that the defendant never consulted any attorney or other person upon the subject of such consent, or in reference thereto, until after execution levied thereunder; that no explanation thereof was given to him by any attorney or other person, and that no attorney attested the execution of the said consent on his behalf; that the defendant never authorized the plaintiffs, or any attorney or other person to enter an appearance for him to the action, save and except so far as the same might be implied in the signing of the consent; and that the plaintiffs and the sheriff had notice, before the completion of the sale, that Hodson had committed an act of bankruptcy, and that a docket had been struck against him—

Sir *T. Wilde*, Serjt., on behalf of the assignees of the defendant, moved, 25th of April, for a rule calling on the plaintiffs to show cause why the order of *ERSKINE*, J., dated the 24th of February last, and the consent mentioned therein, should not, respectively, be set aside, and why the appearance entered for the defendant, *the final judgment* signed in [*532 this *cause, and the execution issued thereon, should not respectively be set aside for irregularity, with costs. The consent was obtained fraudulently, and it was an evasion of 1 & 2 Vict. c. 110, s. 9, being, in effect, a *cognovit* without the formalities required by that statute; (a) the appearance was entered without authority; the order being for 1452*l.* 14*s.* 4*d.* debt, and 2*l.* 10*s.* costs, was no warrant for a judgment for 4800*l.* debt, and 6*l.* 17*s.* costs; and the *fi. fa.* did not pursue the judgment. A rule nisi being granted.

Channell, Serjt., for the plaintiffs, obtained a rule nisi to amend the declaration, the judgment-roll, and the *fi. fa.*, by making the same conformable to the judge's order, and to the judgment entered in the book in the master's office at the time the judgment was signed; or to amend the roll by entering a remittitur as to so much of the debt as thereby appeared to have been recovered beyond the amount for which judgment was authorized by the said order to be signed; and to amend the writ of *fi. fa.* by making the same conformable thereto. He referred to *Webber v. Hutchins*, 8 M. & W. 319, 1 Dowl. N. S. 95, and *Phillips v. Birch*, 5 Scott, N. R. 178, 2 Dowl. N. S. 97, as distinguishable from the present case.

Sir *T. Wilde*, Serjt., now showed cause against the latter rule. This is a question as to the right of the plaintiffs to an amendment of a judgment, signed under a judge's order, made, not upon hearing the parties, but by consent. The order varies from the consent in *several particulars. [*533 The plaintiffs' rule is drawn up on reading a certain affidavit; but that affidavit does not point at the amendment proposed to be made. The judgment signed is upon an appearance; and no authority to enter an appearance is shown. The rule,—which is now in court,—does not show in the margin, that it was signed under a judge's order, as it is submitted it ought to do; as in cases of *cognovit*, 8 M. & W. 819, 1 Dowl. N. S. 95. It is conceived, that in a case where the judge's order has been acted upon, the court will not allow the plaintiff to amend after the rights of third parties have intervened, by reason of a subsequent judgment, or of death, or of bankruptcy; *Webber v. Hutchins*, 8 M. & W. 319, 1 Dowl. N. S. 95. In *Hunt v. Pasman*, 4 Maule & Selw. 329, the court refused to amend a *fi. fa.*, the defendant having become bankrupt. These were cases in which bankruptcy had intervened. In *Phillips v. Tanner*, 6 Bingh. 237, 3 M. & P. 562, the defendant having died after the execution of a *fi. fa.*, the court refused to allow the writ to be amended by inserting the testatum clause,

(a) But see *Eray v. Manson*, 8 Mees. & Welsby, 668; S. C. per nom. *Draine v. Manson* 9 Dowl. P. C. 748; *Baker v. Flower*, 8 M. & W. 670; *Stevens v. Miller*, 3 Scott, N. R. 495 *Thorne v. Neale*, 2 Q. B. 726, 2 Gale & D. 48.

as the amendment might affect the personal representative. *Paris v. Wilkinson*, 8 T. R. 153; *Marsh v. Blachford*, 1 Chitt. 323; and *Levett v. Kibblewhite*, 6 Taunt. 483. [TINDAL, C. J., to Channell, Serjt. These cases are very strong. Have you any on the other side? Channell, Serjt. I mentioned *Webber v. Hutchins* when this rule was moved for. I feel the difficulty; because there, as here, there was a variance between the judgment and the writ of execution. Upon the other points I am prepared to contend that the cases cited do not apply.]

TINDAL, C. J. The cases show that the court will not interfere where
 *534] bankruptcy has intervened. If you look *at the situation of assignees, it is very much like that of a rival judgment creditor, the assignees being considered as having a judgment for the benefit of creditors.

Channell and Byles, Serjts., admitting that they could not successfully resist the authority of the cases cited, the rule was discharged with costs.

Channell and Byles, Serjts., then showed cause against the rule obtained on behalf of the assignees. Although the judgment is irregular, and the writ of *fi. fa.* does not pursue the judgment; yet as the writ is not warranted by the judgment, the assignees are not affected by the writ, and an application to set it aside was unnecessary. [TINDAL, C. J. The writ would be the sheriff's justification, and therefore the assignees were bound to come to the court to set it aside.] At all events, the application is made too late. The seizure was on the 1st of March, the fiat on the 15th, and the choice of assignees took place on the 12th of April; and yet no application was made to the court until the 25th. The assignees are not to be in a better situation than that in which the bankrupt would have stood. Recourse might have been had to a judge at chambers, between the 4th and the 15th of April. And even supposing that the assignees were not called upon to adopt that course, they allow ten days of the term to elapse before they come to the court. It is clear that the application would have been out of time if made at the instance of the defendant, who knew of the irregularity on the 1st of March. In *Weeden v. Garcia*, 2 Dowl. N. S. 64, where judgment was irregularly signed, and execution levied on the 9th of March, it was held too late to apply to set aside the judgment on the 28th
 *535] of April following, either at the instance *of the defendant himself or of his assignees, (he having subsequently become bankrupt,) although the latter were not aware until the 7th of April of the irregularity existing in the judgment. [TINDAL, C. J. In that case the assignees appear to have known of the objection on the 7th of April; the delay therefore was unreasonable, a period of twenty-one days having elapsed.] In *Bate v. Lawrence*, ante, p. 405, judgment was entered up on the 30th of November, 1843, upon a warrant of attorney: on the 4th of December, a writ of *fi. fa.* issued, under which the defendant's goods were seized and sold on the 6th. On the 18th of December, a fiat issued against the defendant, upon an act of bankruptcy (of which the plaintiff had no notice) committed on the 28th of November; the adjudication took place on the

21st of December; and on the 3d of January, 1844, assignees were chosen. On the 16th of January the solicitors to the fiat were aware that the plaintiff's judgment was founded on a warrant of attorney. It was held that a motion *on the first day of Easter term*, 1844, to set aside the judgment and execution, on the ground that it was not signed in strict pursuance of the authority given by the warrant of attorney, was too late.

Sir *T. Wilde*, Serjt., in support of his rule. The affidavits filed in answer to the defendant's rule show that the judgment-roll was not carried in until the 19th of April. The instructions to make the motion were given on the 22d; and the rule was moved for on the 25th. There is therefore no ground for saying, that the assignees have been guilty of laches.

TINDAL, C. J. The judgment and execution must be set aside; but we are of opinion the assignees have asked too much in seeking to set aside the consent. We think that they are entitled to the costs [*536 applicable to that part of the rule on which they have succeeded, and that no action should be brought.

Rule absolute, (which was drawn up in the following terms,)—to set aside the final judgment signed in the cause and execution issued thereon, and that the plaintiffs pay to the defendant and his assignees, or their respective attorneys, the costs, so far as the same shall be applicable to the application to set aside the judgment and execution; and that payment be made to the assignees or their attorney, within a week, of the amount of the proceeds of the goods seized under the said writ of execution; and that the defendant and his assignees be barred from bringing any action against the plaintiffs in respect of the said writ or the proceedings taken thereon.

*DOE dem. The Governors of the GREY-COAT HOSPITAL [*537
v. ROE. May 30.

Service of a declaration in ejectment upon a stranger on the premises, with an admission by the tenant's wife, that the declaration and notice had come to her hands, was held sufficient for a rule nisi for judgment against the casual ejector.

CHANNELL, Serjt., moved for judgment against the casual ejector. As to two of the tenants in possession, viz., Anderson and Hennesley, his affidavit stated a service of the declaration and notice, "by delivering the same to one Charlotte East on the premises mentioned in the declaration, (Anderson and Hennesley being at the time from home,) the said Charlotte East promising the deponent that she would, on the return home of the said Anderson and Hennesley, immediately give the said copies of the said declaration, the one to the said Anderson and the other to the said Hennesley, as she had been requested to do by the deponent." The affidavit alleged that the deponent read over, and explained, the notices to Charlotte East; that

the deponent, on the 21st instant,(a) attended on the premises, and there saw Anderson's wife, who informed the deponent that her husband was still from home and absent from town, but that *she had received the copy of the declaration and notice*, and would give them to her husband; and that the deponent then explained to her the intent and meaning of the declaration and notice and of the service thereof. The affidavit stated that the other tenant had, on the same day,(b) admitted that the declaration and notice left for him had come to his hands. The learned serjeant submitted that the affidavit disclosed sufficient matter to warrant a rule nisi.

Per curiam;

The rule nisi may go.(b)

(a) The day before the term.

(b) It was afterwards made absolute, upon an affidavit of personal service on Anderson.

***538] *LACKINGTON and Others, Assignees of MAY, a Bankrupt,
v. ELLIOTT. May 30.**

On the 29th of December, 1842, A. distrained for 120*l.*, for rent due to him from B. at Michaelmas, the goods of B. being then in the possession of one C., to whom they had been conveyed by deed on the 13th of December, in trust for B.'s creditors. On the 3d of January, 1843, it was agreed between A. and C. that the rent should be paid, A. consenting to forego the quarter's rent due at Christmas. The goods were accordingly appraised and condemned at 136*l.*, being the amount of the rent and expenses, and that sum was handed over to A. On the 9th of January, a fiat issued against B., the act of bankruptcy being the execution of the deed:—*Held*, that so much of the sum so paid to A., as exceeded a year's rent, was not money received to the use of the assignees.

Quare, whether a "distress" is a "transaction" within the 2 & 3 Vict. c. 29; and if so, whether a notice of an act of bankruptcy given to the broker's man, would be sufficient to bind the landlord.

Notice that a party has executed a deed conveying all his property for the benefit of his creditors, is a notice of an act of bankruptcy.

ASSUMPSIT, for money had and received by the defendant, to the use of the plaintiffs, as assignees of James May, a bankrupt. Plea, non assumpsit.

At the trial of the cause before TINDAL, C. J., at the sittings in London after last Hilary term, it appeared that, in 1835, May became tenant to the defendant of a shop, &c., at Clapham, at the rent of 35*l.*, payable quarterly. At Michaelmas, 1842, the arrears of rent amounted to 120*l.* On the 23d of December the defendant delivered a warrant to one Carter, authorizing him to distrain for that sum. Carter gave the warrant to one Taylor, who demanded the rent on the 29th, and was referred by May's wife to Chester, an attorney. Taylor accordingly applied to Chester, who informed him that May had executed a bill of sale of all his property to him, Chester, for the benefit of his creditors, but observed that it was useless to refer to him, as there had been no sale. Taylor thereupon returned to the premises and

***539]** made the distress. At this time an auctioneer* of the name of Price was already in possession, making an inventory preparatory to a sale of the goods on behalf of Chester, as trustee. The conveyance, on the 13th of December, 1842, empowered Chester to sell the property, and to

apply the net proceeds ratably amongst May's creditors. Taylor remained in under the distress until the 3d of January, 1843, when it was arranged that the defendant should retire and should abandon his right to distrain for the quarter due at Christmas, on being paid the 120*l.* and the costs of the distress. In pursuance of this arrangement the goods were appraised and condemned at 136*l.*, which sum covered 120*l.* for the rent, and 16*l.* for expenses, and was paid by Price to Taylor, by whom it was handed over to the defendant's attorney.

On the 9th of January, 1843, a fiat issued against May, the act of bankruptcy relied on being the conveyance of the 13th of December, 1842.

For the defendant, it was insisted that the action was not maintainable, the money having been paid by Price for a good consideration, and there having been, in fact, no sale; and that, at all events, the transaction was within the protection of the 2 & 3 Vict., c. 29,(a) the notice to Taylor not being such a notice as would bind *the defendant, and it not appear- [540
ing to have been communicated to him by Taylor.

For the plaintiffs, it was contended that the defendant was precluded by the seventy-fourth section of the 6 G. 4, c. 16,(b) from availing himself of the distress beyond the amount of one year's rent, he having (by his agent Taylor) had notice that May had previously committed an act of bankruptcy; and consequently that they were entitled to recover the difference between one year's rent and the sum received by the defendant, as money received to their use.

A verdict was taken for the plaintiffs, damages 85*l.*, leave being reserved to move to enter a nonsuit, if, under the circumstances, the action was not maintainable.

Channell, Serjt., in Easter term last, moved accordingly. The money having been paid by Price on a good consideration, viz., the withdrawal of the distress already made and an agreement to abstain from enforcing payment of the last quarter's rent by a new distress—*Williams v. Leper*, 3 Burr 1886, 2 Wils. 308; *Bampton v. Paulin*, 4 Bingh. 264, 12 J. B. Moore, 497—cannot be recovered back as money had and received to the use of the assignees. At all events, the defendant was within the protection of the 2 & 3 Vict., c. 29, the notice to Taylor of the act of bankruptcy not being notice

(a) Which enacts, "that all *contracts, dealings, and transactions* by and with any bankrupt really and *bonâ fide* made and entered into before the date and issuing of the fiat against him and all *executions and attachments* against the lands and tenements or goods and chattels of such bankrupt, *bonâ fide* executed or levied before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; provided the person or persons so dealing with such bankrupt, or at whose suit or on whose account such execution or attachment have issued, had not, at the time of such *contract, dealing or transaction*, or at the time of executing or levying such *execution or attachment*, notice of any prior act of bankruptcy by him committed."

(b) Which enacts, "that no distress for rent made and levied after an act of bankruptcy upon the goods or effects of any bankrupt (whether before or after the issuing of the commission) shall be available for more than one year's rent accrued prior to the date of the commission; but the landlord or party to whom the rent shall be due, shall be allowed to come in as a creditor under the commission for the overplus of the rent due, and for which the distress shall not be available."

*541] to the landlord—*Ramsay v. Eaton*, 10 M. & W. 22—he not *being the party immediately employed by him. The learned serjeant submitted that the notice itself was not a sufficient notice in point of fact ; as it should have been a distinct notice of circumstances distinctly amounting to an act of bankruptcy, and not a mere intimation of that which might or might not amount to an act of bankruptcy.

A rule nisi was granted on the first two points, but not upon the last ; the court observing that there had been a substantial notice to Taylor of facts implying that an act of bankruptcy had been committed by May—a notice of the execution by him of the deed which was afterwards given in evidence.(a)

Byles, Serjt., (with whom was *W. H. Watson*,) now showed cause. The landlord has, contrary to the express provisions of the statute, distrained for more than one year's rent, and has seized and sold property which by the act of bankruptcy had vested in the plaintiffs as May's assignees. The excess therefore is clearly money received to the use of the assignees, being the parties to whom the goods belonged. This is distinctly laid down by Lord HARDWICKE in *Kitchen v. Campbell*, 3 Wils. 304, 2 W. Bla. 827. *Smith v. Jones*, 1 Dowl. N. S. 526, was decided upon the same principle.

The defendant cannot avail himself of the 2 & 3 Vict. c. 29, a distress not being within the protection intended to be afforded by that statute. [TINDAL, C. J. Does not "attachment" virtually include a distress? It is a holding of the goods in pledge.] In *Ex parte Slyn*, 2 Mont., Deacon & De Gex, 219, a deposit, by way of pledge of a policy of assurance, was held to be a *transaction or dealing* within the statute ; but in no case has the word *542] "attachment" *received so extended a construction. The legislature may have thought the interests of the landlord were sufficiently protected. Assuming, however, that notice of the bankruptcy was necessary, the notice to the broker was sufficient notice to the landlord. *Rothwell v. Timbrell*, 1 Dowl. N. S. 778, is in point. It was there held that an act of bankruptcy, committed by an assignment of all a trader's property for the benefit of his creditors, and communicated to the attorney of an execution-creditor previously to the issuing of a *fi. fa.*, will invalidate the execution as against the assignees, notwithstanding the 2 & 3 Vict. c. 29, although the fiat issued after delivery of the writ to the sheriff. In that case notice to the attorney was held to be sufficient ; *à fortiori*, notice to the broker, who is the general agent for the purposes of the distress. In *Ramsay v. Eaton*, 10 M. & W. 22, notice of an act of bankruptcy to a sheriff's officer in possession under a *fi. fa.*, was held not to be notice to the execution-creditor within the 2 & 3 Vict. c. 29 ; the sheriff being the officer of the court, and not the agent of the execution-creditor. That case is consistent with *Rothwell v. Timbrell*. [TINDAL, C. J. The question is, whether there was a sale of the goods by the defendant, or whether the remedy of the assignees is not against the trustee who made the actual sale

(a) See *Ramsay v. Eaton*, 10 M. & W. 22 ; *Rothwell v. Timbrell*, 1 Dowl. N. S. 778.

on the 9th of January.] The transaction on the 3d of January between Price and the defendant was a sale; and the subsequent dealing with the goods by Price on behalf of the trustee did not alter the transaction. [CRESSWELL, J. If the landlord had received the rent and expenses from the tenant, could it have been contended that that was a sale?] That would be a very different case from the present. [CRESSWELL, J. There is another difficulty in treating this as a sale. What money was paid for the *goods?] 120*l*. [CRESSWELL, J. That sum was paid for the [*543 goods and the agreement by the landlord to abandon his right to distrain for the quarter's rent due at Christmas.] That, it is submitted, can make no difference. The transaction was treated, by both parties, as a sale under the distress. That, however, is a question for the jury.

Sir T. Wilde and Channell, Serjts., in support of the rule. When it is left to the court to say whether, upon the facts, a nonsuit ought to be entered, it is open to either party to contend that the facts should have been submitted to the jury. Here, the distress was on the 29th of December, the payment to the landlord on the 3d of January, and the fiat issued on the 9th of that month. Had this been the case of a *fi. fa.* upon a judgment by *nil dicit*, the execution being perfected and the money paid, it would not have been affected by a subsequent fiat. There is no substantial difference between the 74th and 108th sections of the 6 G. 4, c. 16; the former directs, that "no distress for rent made and levied after an act of bankruptcy upon the goods or effects of a bankrupt, *shall be available* for more than one year's rent;" the latter, that "no creditor who shall sue out execution upon any judgment obtained by default, confession, or *nil dicit*, *shall avail himself of such execution* to the prejudice of other fair creditors." The relation to the act of bankruptcy being destroyed by the 2 & 3 Vict. c. 29, the payment made before the fiat, and without notice of an act of bankruptcy, cannot be disturbed. A distress comes within the term "attachment" in that statute, which was probably used in former acts in the sense in which it is used in Comyns's Dig. tit. *Process*. It is within the scope of the statute, which was intended to embrace every transaction that could be affected by the ancient doctrine of relation. The legislature never could have meant to give to *themselves as landlords a less degree of protection than [*544 is afforded to other classes of creditors. The question then arises whether or not the defendant had notice of an act of bankruptcy having previously been committed by May. The broker's man was an agent employed to perform a certain duty; beyond that, he was intrusted with no discretion. The statute will be rendered nugatory if every messenger or subordinate, or servant, is considered an agent to receive notice. This case falls precisely within *Ramsay v. Eaton*.

But, in fact, there was in this case no sale at all. The landlord had a statutory power of sale in default of payment of the rent within the five days. Fearing that the exercise of this power might be prejudicial to the creditors, and desiring himself to have the conduct of the sale, the trustee

bought off the landlord's claim, including his right to distrain for the Christmas rent. There was no change of property, and no title acquired by the trustee under the landlord; *Lee v. Lopes*, 15 East, 230.

The money having been paid, cannot be recovered back; *Longridge v. Dorville*, 5 B. & Ald. 117; *Stracy v. The Bank of England*, 6 Bingham 754, 4 M. & P. 639. (a) The assignees have no power to interfere with a contract to which they were not parties.

TINDAL, C. J. The first question raised at the trial, viz., whether the money was the produce of the sale of goods, the property of the assignees, appears to me to dispose of this case. If the landlord has sold the goods of the assignees, they may waive the tort, and sue for money had and received. But it was not shown that any sale took place. The landlord, when he distrained on the 29th of December, had a mere right to detain the goods as a pledge, and to sell them at the expiration of five days, in *545] case the rent should be then unpaid. *Before the expiration of the five days, it was arranged between the trustee under the deed of assignment and the landlord's agent, that the trustee should buy the landlord out by paying the amount distrained for. The goods remained upon the premises, and the trustee's servant was in possession at the time of the distress, and so continued. There was therefore no change of possession or of property; the landlord withdrew and the goods remained in the hands of the trustee. Nothing in the transaction bore the aspect of a sale. No public notice was given, and there was no sale by public auction. The landlord could not by law have so disposed of the distress. This shows that the transaction differed from an ordinary sale by a landlord in satisfaction of a claim for rent. Another circumstance proves conclusively to my mind that this was not a sale, but a mere buying out of the landlord. The distress was taken on the 29th of December, for rent due up to the preceding Michaelmas. The landlord had at that time a right to distrain for another quarter's rent. One part of the arrangement which he came to with the trustee was, that he should forego the quarter's rent due at Christmas. This would be sufficient to satisfy me that the money now sought to be recovered was not produced by any sale of the property of the assignees. If it be asked, whose money was received by the defendant, the answer is, that it may have been the money of Price, the auctioneer, who, to answer some purposes of his own, volunteered to make the payment; or the payment may have been made by Price as the agent of the trustee, who thought it desirable that the goods should be sold by himself rather than by the landlord, and did not then contemplate the bankruptcy of May. But there appears to be nothing to warrant the conclusion that it was money had and *546] received to the use of the assignees; *and therefore I think the rule for entering a nonsuit should be made absolute.

COLTMAN, J. I am of the same opinion. Whatever appearance of a sale the transaction may have at first sight, upon a closer investigation it turns

out to have been a mere bargain to get rid of the landlord's claim: it has none of the regular and usual incidents of a sale. The goods had been distrained upon by the landlord; and, by arrangement between him and Price, the agent of the trustee, they were to be appraised and condemned at the precise amount of the rent and expenses, which tends to show that no sale was contemplated. (a) The condemnation (as it is called) was a mere settlement between the parties, and not a sale. The landlord wanted his rent; and Price was anxious, on the part of the trustee, to discharge the goods from the landlord's claim. If my brother *Byles* had not at the trial assented to the reservation of leave to move to enter a nonsuit if the court should be against him upon this point, all we could have done would have been to grant a new trial. But the whole case was left to the court to be decided upon an agreed state of facts. I am of opinion that there was no sale of these goods; and I think it would be dangerous to hold that the delivery of goods distrained upon, to the owner on the premises, amounted to a sale under the distress. The rule for entering a nonsuit must be made absolute.

CRESSWELL, J. I am of the same opinion. By consent of the parties, it is left to the court to say whether or *not there was a sale of these goods. The words sale and purchase do not appear to me to [547 have been used in their ordinary and proper sense in the discussion of this case. The whole transaction seems to have been a mere arrangement to dispose of the landlord's claim. When the distress was taken on the 29th of December, the goods were in the possession of the trustee under the deed of assignment, and were about to be sold. The distress gave the landlord no property in the goods, but a mere lien, with a right to sell provided the rent were not paid within the five days. The arrangement could not have been intended to be, that the landlord should sell to the trustee, and that the trustee should buy that which was already his property, though subject to the limited right of the landlord before mentioned. The payment was made for the purpose of redeeming the goods from the landlord's claim in respect of the distress already made, and to get rid of his right to distrain for the further rent due at Christmas. The only ground upon which the plaintiffs can maintain this action, is that the defendant has sold goods belonging to them, and has received the proceeds. But there was no sale in the sense that would make the proceeds money had and received to the use of the assignees. The fact of a sale failing, the plaintiffs' right of action fails also. It is unnecessary to give any opinion on the point raised respecting the operation of the 6 Geo. 4, c. 16, s. 74, and the 2 & 3 Vict. c. 29. Whenever that question properly comes before the court, it may be well to consider whether *Whitmore v. Robertson*, 8 M. & W. 463, and

(a) In replevin, where goods are taken beyond the amount of the rent, the jury commonly find the goods to be of the precise value for which the distress was taken. But this causes no inconvenience; for as the avowant's judgment is for the sum found, the excess of value is immaterial.

Sleay v. Carter, 11 M. & W. 571, and the cases that have followed them, have not some application to the 74th as well as to the 108th section of the 6 Geo. 4, c. 16.

Rule absolute for entering a nonsuit.

*548] *PETERS and Another v. CLARSON and Another. June 3.

By a highway act, (5 & 6 W. 4, c. 50, s. 67,) surveyors (or way-wardens) are empowered to make drains on lands adjoining any highway upon paying the owner for the damages sustained thereby, to be settled and paid as the damages for getting materials in enclosed lands are therein directed to be settled and paid. The power of getting such materials is given by the act (sec. 54)—the said surveyor making such satisfaction for the materials, and also for the damage done to such lands, as shall be settled and ascertained by order of the justices at a special session for the highways. The act directs, (sec. 109,) that no action shall be commenced against any person for any thing done in pursuance of the act, until twenty-one days' notice thereof has been given, nor after sufficient satisfaction or tender of satisfaction has been made, and in case of an action being brought, if the matter appears to have been done under the act, or if it appears that such action was brought before twenty-one days' notice thereof, or that sufficient satisfaction was made or tendered, the jury shall find a verdict for the defendant:

Held, that tender of satisfaction for damage done in making a drain, was not a condition precedent to the right of entry on the land:

Held, also, that the amount of satisfaction could only be ascertained by the justices at a special session:

Held, also, (per Tindal, C. J.,) that assuming it to be the duty of the way-warden to apply at a special session for the purpose, there was no time limited for his doing so; and that the notice of action would not create such a limitation:

Held, also, (per Coltman, J.,) that tender of satisfaction before action brought is not required in cases where the way-warden has complied with the provisions of the act.(a)

TRESPASS *quare clausum fregit*.

Pleas, first, not guilty (by statute). Secondly, entry to cleanse out a ditch adjoining a public highway, which the plaintiffs had wrongfully stopped up.

(a) The following sections of the act were referred to in the course of the argument:—

Sect. 45, which enacts, "that it shall and may be lawful for the justices of the peace within their respective divisions, or any two or more of them, and they are hereby required, to hold not less than eight nor more than twelve special sessions in every year for executing the purposes of this act, the days of the holding thereof to be appointed at a special session to be held within fourteen days after the 20th day of March in every year: and at the said special session held next after the 25th day of March in every year, the surveyor of each of the parishes within their respective divisions, shall verify his accounts and shall make a return in writing to such special session, of the state of all the roads, common highways, bridges, causeways, hedges, ditches, and watercourses appertaining thereto, and of all nuisances and encroachments, if any, made upon the several highways within the parish for which he was surveyor, as well as the extent of the different highways which the said parish is liable to repair, which part thereof has been repaired, and with what materials, at what expense, and what was the amount levied during the time he was surveyor of the said parish."

Sect. 54, which enacts, "that it shall be lawful for every such surveyor, for the use aforesaid, (in sect. 46,) by license in writing from the justices at a special session for the highways, to search for, dig, and get materials, &c., in or through any of the several or enclosed lands or grounds of any person whomsoever, &c., adjoining or lying near to the highway for which such materials shall be required, &c.; and to take and carry away so much of the said materials as, by the discretion of the said surveyor, shall be thought necessary to be employed in the amendment of the said highways; the said surveyor making such satisfaction for the materials which may be got or taken away, and also for the damage done to

*The plaintiffs, admitting the existence of the highway, replied *de injuriâ absque residuo causæ*. [*549]

At the trial before TINDAL, C. J., at the last spring *assizes for the county of Warwick, the following facts appeared. The defendants, who were way-wardens (appointed under the 5 & 6 W. 4, c. 50) for the parish of Garmouth in that county, on the 24th of March, 1843, entered a close belonging to the plaintiffs, adjoining the highway, and opened a drain for carrying off water from the road, which had been closed up by the plaintiffs. On the 8th of April following, notice of action was given, and the present action was commenced on the 9th of May, up to which time no tender of satisfaction or amends had been made on behalf of the defendants, nor had any proceedings been taken by them to ascertain the amount of damage done to the plaintiffs' land. *It was not shown that any special session had been held between the day of the entry and the commencement of the action. [*551]

It was contended on the part of the plaintiffs, that under the 67th section of the act, it was the duty of the defendants to ascertain the amount payable to the plaintiffs by way of compensation, and to tender the same before they

such lands or grounds by the getting and carrying away the same, as shall be settled and ascertained by order of the justices at a special session for the highways."

Sect. 67 enacts, "that the surveyor, district-surveyor, or assistant-surveyor, shall have power to make, scour, cleanse, and keep open all ditches, gutters, drains, or watercourses, and also to make and lay such trunks, tunnels, plats, or bridges, as he shall deem necessary, in and through any lands or grounds adjoining or lying near to any highway, upon paying the owner or occupier of such lands or grounds, provided they are not waste or common, for the damages which he shall sustain thereby, to be settled and paid in such manner as the damages for getting materials in enclosed lands or grounds are herein directed to be settled and paid."

Sect. 68 enacts, "that if any owner or occupier, or other person, shall alter, obstruct, or in any manner interfere with any such ditches, &c., after they shall have been made by, or taken under the charge of, such surveyor or district-surveyor, and without his authority and consent, such owner, occupier, or other person shall be liable to reimburse all charges and expenses which may be occasioned by reinstating and making good the work so altered, obstructed, or interfered with, and shall also forfeit any sum, not exceeding three times the amount of such charges and expenses."

Sect. 109 enacts, "that no action or suit shall be commenced against any person for any thing done in pursuance of, or under the authority of this act, until twenty-one days' notice has been given thereof in writing to the justice, surveyor, or person against whom such action is intended to be brought, nor after sufficient satisfaction or tender of satisfaction has been made to the party aggrieved, nor after three calendar months next after the fact committed for which such action or suit shall be so brought; and every such action shall be brought, laid, and tried where the cause of action shall have arisen, and not in any other county or place; and the defendant in such action or suit may plead the general issue, and give this act and every special matter in evidence at any trial which shall be had thereupon; and if the matter or thing shall appear to have been done under or by virtue of this act, or if it shall appear that such action or suit was brought before twenty-one days' notice thereof given as aforesaid, or that sufficient satisfaction was made or tendered as aforesaid, or if any action or suit shall not be commenced within the time before limited, or shall be laid in any other county than as aforesaid, then the jury shall find a verdict for the defendant therein; and if a verdict shall be found for such defendant, or if the plaintiff in such action or suit shall become nonsuit, or suffer a discontinuance of such action, or if, upon any demurrer in such action, judgment shall be given for the defendant therein, then and in any of the cases aforesaid, such defendant shall have costs as between attorney and client, and shall have such remedy for recovering the same as any defendant may have for his or her costs in any other case by law."

entered upon the land ; or that, at any rate, under that section and the 54th they ought themselves to have brought the matter before the special sessions, so that the amount of compensation might have been there ascertained ; and that not having done either, they were trespassers *ab initio*. The defendants admitted that a verdict must pass against them upon the second issue, and the Lord Chief Justice directed the jury to find a verdict for the defendants upon the first issue, reserving leave to the plaintiffs to move to enter a verdict for themselves on that issue, with 40s. damages, if the court should be of opinion that the defendants were not protected by the statute.

Channell, Serjt., in last Easter term, moved accordingly, citing the following cases : *Boyfield v. Porter*, 13 East, 200 ; *Paddock v. Forrester*, ante, Vol. III. p. 903, 3 Sc. N. R. 715. [TINDAL, C. J., referred to *The Six Carpenters' case*, 8 Co. Rep. 146 a, and CRESSWELL, J., to *Lister v. Loblely*, 7 A. & E. 124.] A rule nisi being granted,

Adams, Serjt., (with whom was *G. Hayes*,) now showed cause. The only question for argument is, whether it was necessary for the defendants to tender amends. The amount of such amends must be settled by the justices of the peace in special sessions. By the forty-fifth section of the *552] present general highway act, the special sessions *are appointed by the justices themselves. The way-wardens have no power to call upon the justices to meet in sessions ; though under the former highway act (13 G. 3, c. 78,) it might perhaps have been said that the surveyor ought to have procured a session to be held. The fifty-fourth and sixty-seventh sections of the 5 & 6 W. 4, c. 50, point out the method of assessing any damages. The way-wardens had a clear right to go upon the land and make the drain in question ; and the statute expressly directs that the amount of damage sustained by the owner shall be settled by the justices at a special session. *Boyfield v. Porter* decides that such is the *only* mode of settlement. Lord ELLENBOROUGH, C. J., there says, "The parties have no choice of any other tribunal to rate the amends in any case within the act." There is nothing in the present case to take it out of that principle. It is said there was no tender of amends ; but none is required by the statute ; and such a requirement would have been inconsistent with its general provisions. A tender was not necessary to give jurisdiction to the sessions. It is then said that it is the duty of the way-wardens to put the sessions in motion ; but it is the party who says he is injured who ought to complain of the injury. The drain may be a benefit to the plaintiffs' lands, and in that case they have no claim to any damages. [TINDAL, C. J. You take away some portion of his soil ; that may be worth something.] The drain would be covered up, so that nothing would be lost.

But even assuming it was the duty of the defendants to bring the matter before the justices, there was no laches on their part. Notice of action was given within fourteen days after the act complained of ; and it cannot be contended that the defendants were bound to call for a special session so

soon after the work was done. No period is limited by the statute within which the session must be held. [TINDAL, C. J. By the 109th section, *twenty-one days must intervene between the notice and the com- [553
mencement of the action; within which period the surveyors might
tender amends if necessary, or go before the justices.] There was no evi-
dence that any sessions were held in the interim between the alleged tres-
pass and the commencement of the action.

But, even if both these points are decided against the defendants, they will not be trespassers. The act gives them an authority to enter upon the land; and no subsequent nonfeasance, on their part, can make them trespassers *ab initio*. The plaintiffs may have a remedy against the defendants, if the latter have been guilty of any neglect, by an action on the case; or, possibly, they may be entitled to a mandamus in order to compel the defendants to go before the justices. By the 109th section, "if the matter or thing shall appear to have been done under or by virtue of this act, then the jury *shall find* a verdict for the defendants therein." These words are imperative. There is no doubt that the matter in question was done *under the act*. If it had been done *bona fide*, but under a mistaken view of the powers conferred by the act, there might have been a "tender of satisfaction;" in which case, also, the defendants would have been entitled to a verdict.

Manning, Serjt., (with whom was *Mellor*,) showed cause. The case of *Boyfield v. Porter*,—decided upon the construction of the highway act of the 13 G. 3, c. 83,—created a hardship, which was probably felt by the legislature. The language of the sixty-seventh section of the present act is very different from that of the twenty-ninth and seventy-ninth sections of the former act, upon which that case turned. By the sixty-seventh section of the present act, the way-warden may make ditches, &c., "upon paying the owner or occupier of such lands, &c., for the damages which he shall sustain thereby." The *object of the act is, to put parties whose [554
lands may be used, in the same condition as those whose land is
taken by canal, or railway companies. The amount to be paid, *nomine damni*, should be assessed before the land is taken. It is a condition precedent to the right to enter. [TINDAL, C. J. How could it be inquired into before the act was done? How could the way-wardens ascertain how long they might be on the land, or what would exactly be required to be done?] The same remarks would apply in the cases of railways or canals. [CRFESSWELL, J. In canal or railway acts there is this difference. The company are to *buy* the land, not to make compensation to the owner for damage. They must, therefore, tender the *price* of the land before they enter.] The court of King's Bench expressed a strong opinion upon this point in *Lister v. Lobley*, 7 A. & E. 124. If the payment of the amount of damage is not a condition precedent, then the sole object of the legislature, in requiring a notice of action, would seem to be, to enable the party to go before the magistrate in order to ascertain the amount of damages. It

is true that the words in the 109th section as to the tender of satisfaction are in the alternative—"if it shall appear that such action or suit was brought before twenty-one days' notice thereof given as aforesaid, *or* that sufficient satisfaction was made or tendered as aforesaid"—but, it is submitted that the word "*or*" must there mean "*and*;" otherwise the enactment is of no effect. If the way-wardens did an act not within the statute, they would be liable as any other persons; the obvious meaning of the enactment is, that in every case there shall be either payment or tender of amends.

As to the mode of ascertaining the amount of compensation, it is to be observed that the way-wardens are the actors. They invade the land of
 *555] another. It is their *duty, then, to ascertain the amount of damage to be tendered. In *The Six Carpenters' case*, there was no time limited for the payment of the price of the wine. [TINDAL, C. J. What time is limited here?] The twenty-one days after the notice of action. [TINDAL, C. J. Your giving notice of action will not operate as a statutory limitation.] In *Paddock v. Forrester*, where the right claimed was to enter and dig for minerals, *making compensation*, there was no provision as to the particular time when the amount of compensation was to be tendered. It would have been impossible there, also, to ascertain beforehand the amount of damage that might be done. It might be only to the extent of five shillings, or it might reach the whole value of the fee-simple.

TINDAL, C. J. It appears to me that the 67th section of the general highway act does not make the ascertaining of the damages, or the payment or tender thereof, a condition precedent to the right of entry upon the land taken under the authority of the act. The object of the defendants in entering upon the plaintiff's land was, to make a drain to carry off the water from the adjoining highway. Under the 67th section, the way-wardens have authority to make drains, &c., in any lands adjoining, "upon paying the owner or occupier of such lands or grounds for the damages which he shall sustain thereby." It would be most favourable for the plaintiffs to stop at this point: for, looking at the words "*upon* paying for the damages," it might be said that the entry on the land and the payment of satisfaction were to be concurrent acts. But, as it is obviously impossible to pay for an unknown quantity of damage, if there had been no reference to the 54th section, I should have thought the condition not precedent, but subsequent, and that the amount must therefore be something to be after-
 *556] wards ascertained. But the section does not *stop there; for it goes on to say, that "the damages are to be settled and paid in such manner as the damages for getting materials in enclosed lands or grounds are directed to be settled and paid." This refers us back therefore to the 54th section, which prescribes the manner in which such last-mentioned damages are to be settled and paid for. That section gives authority to the way-warden to enter upon certain lands and take materials for the highway, "the said surveyor making such satisfaction for the mate-

rials which may be got or taken away, and also for the damage done to such lands or grounds by the getting and carrying away the same, as shall be settled and ascertained by order of the justices at a special sessions for the highways." I cannot see any material distinction between the expression "upon paying" in the 67th section, and "making such satisfaction" in the 54th. The case of *Boyfield v. Porter* is an authority to show, that after taking the materials from the land, the determination of the amount of the damage is left to the sessions. That case was decided upon the former highway act, the 13 Geo. 3, c. 78. Is there any substantial distinction between the provisions of that act and those of the present act? I think there is not. By the 29th section of the former act, the surveyor or waywarden was authorized to enter upon enclosed lands, and to carry away materials for the highways: "the said surveyor making such satisfaction for the damage to be done to such lands by the getting and carrying away the same, as shall be agreed upon between him and the owners, &c., and, in case they cannot agree, then such satisfaction and recompense shall be settled and ascertained by order of one or more justice or justices of the peace," &c. Except, therefore, for the interposition of the power of immediate agreement between the parties, in the 13 Geo. 3, c. 78, the mode of ascertaining the amount of damage appears to be the same in both acts. *And we must, in this case, follow the decision in *Boyfield v. Porter*, namely, that the amount of the damage must be fixed, not by a jury, but by the magistrates in special session. [*557]

It has been said, indeed, that even if the making or tendering of compensation is a condition *subsequent*, still there was a duty on the waywardens to ascertain the amount. But no time is limited by the act for their doing so. The notice of action given by the plaintiffs will not have the effect of limiting the period. There is nothing to prevent them from ascertaining it now.

COLTMAN, J. I am of the same opinion. The words in the old highway act are, "the said surveyor making such satisfaction, &c., as shall be agreed upon;" and then if the parties cannot agree, "such satisfaction, &c., shall be settled and ascertained" by the justices. The words in the present act, "upon paying the owner, &c., for the damages" in the manner pointed out by a former section, where the words are "the said surveyor making such satisfaction, &c., as shall be settled and ascertained by the justices," are rather more like a condition; but I think, upon the old decisions, that they do not amount to a condition precedent. It has been argued that even if the making satisfaction to the party is a condition subsequent, still it was the duty of the waywardens to go before the magistrates, and to make a tender, before action brought. The provisions of the 109th section are relied upon in support of that proposition; and it is contended that, under that section, a waywarden must tender satisfaction, and therefore that he is bound to ascertain the amount of damage, before the commencement of the action. Where a waywarden has *not* pursued

the act of parliament, it may be necessary that he should make such a tender of amends; but I think that where he has conformed to *the
 *558] act, it is not necessary that he should go before the justices at a special session in order to ascertain the amount of damage done. If it were so, it would involve this absurdity, that if no session were held between the time when the act complained of was done, and the commencement of the action, it would be impossible to ascertain the amount of damage; and it would be manifestly absurd to hold that a party was bound to take a course which he might not be able to adopt.

CRESSWELL, J., concurred.

Rule discharged.

BROWN v. COPLEY, Bart., BLAND and TURTON. June 4.

Where goods are taken by special bailiffs under an attachment to compel an appearance in the county court; and an appearance is subsequently entered, whereupon the sheriff issues a *superseas* commanding the bailiffs to return the goods, but the bailiffs refuse to do so; *Held*, that the sheriff is not guilty of a conversion.

TROVER, for a watch and other chattels.

Plea, by the defendant Copley, not guilty; and issue thereon.

The other defendants pleaded, first, not guilty; secondly, that the plaintiff was not possessed, &c.; upon both of which pleas issue was joined; thirdly, that on the 1st of June, 1843, at the county court of Sir Joseph William Copley, Bart., sheriff of the county of York, before the suitors of the said court, holden at the castle of York, in and for the county aforesaid, within the jurisdiction of the last-mentioned court, to wit, on the day and year aforesaid, before Sir J. W. Copley, Bart., sheriff of the said county, according to the custom of the said county, from time whereof the memory of man *knoweth* not to the contrary, used and approved of, came one Ann
 *559] Weldon, by S. W. Turner, her attorney, *and then in the last-mentioned court, according to the custom of the last-mentioned court, levied her certain plaint against the now plaintiff, in a plea of trover, for damages to the amount of 39s. 11d., for a certain cause of action arising and happening within the jurisdiction of the last-mentioned court; that thereupon such proceedings were had,—as by the entry and proceedings of the said court, still remaining in the said last-mentioned court, fully appears,—that the said Sir J. W. Copley, Bart., sheriff of the said county as aforesaid, afterwards, to wit, on the 12th of July, 1843, and within the jurisdiction of the said court, issued his certain precept under the seal of his office, and bearing date the 12th July, 1843, to the same James Bland and James Turton, bailiffs for the purpose of executing the said precept specially deputed, whereby the said sheriff commanded the said James Bland and James Turton that they, or one of them, should attach the now plaintiff, by his goods and chattels, that he might be, and appear, at the castle of York, in the said county, at the next county court to be there

holden, on Wednesday the 9th of August, then next, to answer the said Ann Weldon in an action of trover, damages 39s. 11d., and that they should have there the said precepts; which precept was, afterwards, and before the said return thereof, to wit, on the 21st of July, 1843, and within the jurisdiction of the last-mentioned court, delivered to the said James Bland and James Turton, who did afterwards, to wit, at the same time when, &c., and whilst the said precept was in force, and within the jurisdiction of the last-mentioned court, take and seize the said goods and chattels in the declaration mentioned, as it was lawful for them to do for the cause aforesaid; being the conversion in the declaration mentioned. Verification.

New assignment to the last-mentioned plea; that the plaintiff issued his writ in this suit, and declared *thereupon, not for the conversion [560 in the said plea mentioned, but for the conversion under the circumstances thereafter mentioned; and, further, that the said Sir J. W. Copley, so being sheriff as aforesaid, according to the course and practice of the said court, afterwards, and after the issuing of the precept in the third plea mentioned, to wit, on the 24th of July, 1843, duly issued his certain precept in writing, under the seal of his office, called a *supersedeas*, bearing date the day and year last aforesaid, directed to the said James Bland and James Turton, his bailiffs, whereby, after reciting that by the said precept under the seal of his office (thereby meaning the said attachment) he had commanded them that they, or one of them, should attach the now plaintiff by his goods and chattels, so that he might be and appear at the castle of York, in the county of York, at the then next county court, to be there holden for the said county on Wednesday, the 9th day of August, 1843, to answer the said Ann Weldon in the said action in trover, and also reciting that the now plaintiff had appeared to answer the said Ann Weldon in the plea aforesaid, and as aforesaid, the said Sir J. W. Copley, so being sheriff, as aforesaid did thereupon command the said James Bland and James Turton that, from the execution of the last-mentioned precept they should altogether desist, and that if any goods or chattels of the now plaintiff had been seized by them, or either of them, under the said precept, then without delay they should cause the same to be restored and delivered to the now plaintiff; that afterwards, and after the issuing of the said precept called a *supersedeas*, and before the return thereof, to wit, on the 25th of July, 1843, the said James Bland and James Turton, then being and continuing in possession of the goods and chattels so taken and seized as in the third plea mentioned as such bailiffs, had notice of the said *supersedeas*, and were served therewith, and the said *James Bland and James [561 Turton were thereupon then duly requested by the now plaintiff, under and by virtue of the said *supersedeas*, without delay to restore and deliver to him the goods and chattels and every of them, according to the said precept called a *supersedeas*; but to restore or deliver the said goods and chattels, or any of them, the defendants Bland and Turton wrongfully and unjustly wholly refused, and then converted and disposed of the same

to their own use; which was the conversion of the goods and chattels in the declaration mentioned; and that such conversion above newly assigned, was another and different conversion from the conversion in the third plea mentioned, and therein attempted to be justified. Verification.

Plea by the defendants Bland and Turton to the new assignment—not guilty.

At the trial of the cause before COLTMAN, J., at the last assizes for Yorkshire, the following facts appeared:—

In June, 1843, Ann Weldon commenced an action of trover against the now plaintiff, in the county court of Yorkshire, of which county the defendant Copley was sheriff. That action was brought in respect of certain goods which had been distrained by the now plaintiff for rent. A summons having been served upon the now plaintiff, calling upon him to appear at the county court on the 12th of July following, and no appearance having been entered on his behalf according to the practice of the said court, an attachment issued against him on the day last-mentioned, of which the following is a copy:—

“Attachment, } Sir Joseph William Copley, Bart., sheriff of the
 “Yorkshire, to wit, } said county of York, to James Bland and James
 Turton, bailiffs for this purpose specially deputed, greeting; I command
 you that you, or one of you, do attach Roger Brown by his goods and
 *562] chattels, so that he may be, and appear, at *the castle of York, in
 the county of York, at the next county court to be there holden for
 the same county, on Wednesday, the 9th day of August next, to answer to
 Ann Weldon in an action of trover, damages 39s. 11d., and that you have
 there this precept.

“Given, under the seal of my office, this 12th day of July, 1843,

“By the county clerk.”

On the 15th of July, the defendants Bland and Turton, in execution of this process, entered the now plaintiff's house, and seized and carried away the goods which were the subject of the present action.

An appearance was subsequently entered on behalf of the now plaintiff; whereupon, at his instance, the following *supersedeas* was issued:—

“Supersedeas, } Sir Joseph William Copley, Bart., sheriff of the
 “Yorkshire, to wit, } county of York, to James Bland and James
 Turton, my bailiffs, greeting; whereas by a precept under the seal of my
 office, I lately commanded you that you, or one of you, should attach Roger
 Brown by his goods and chattels, so that he might be and appear at the
 castle of York, in the county of York, at the next county court to be there
 holden for the said county, on Wednesday the 9th day of August, to answer
 Ann Weldon in an action in trover: now, because the said Roger Brown
 hath appeared to answer the said Ann in the plea aforesaid, I command
 you that from the execution of the aforesaid precept you do altogether
 abstain; and if any goods or chattels of the said Roger have been seized, by

you or either of you, under the said precept, that then, without delay, you cause the same to be restored and delivered to the said Roger.

“ Given, under the seal of my office, the 24th day of July, 1843,

“ By the county clerk.”

*The supersedeas was served upon the defendants Bland and Turton ; and a rule was afterwards obtained in the county court ordering the then plaintiff to give up the goods ; but the now plaintiff was unable to obtain a restitution thereof. Whereupon the present action was commenced. [*563]

It further appeared that there were no regular bailiffs of the county court ; that the defendants Bland and Turton had been specially appointed bailiffs in this matter, at the request of the then plaintiff's attorney ; and that an indemnity had been given by him to the defendant Copley. It was objected, on behalf of the defendant Copley, that this indemnity was not admissible for want of a stamp, it being shown that, although the value of the goods seized was only 8*l.*, the costs in addition would make up a sum above 20*l.* The learned judge, however, received the indemnity ; which was as follows :

“ In the county court }
of Yorkshire, }

“ Ann Weldon, - - Plaintiff,
and

“ Roger Brown, - - Defendant.

“ I do hereby certify that the summons issued in this cause was duly and legally served upon the above-named defendant, previously to the day on which the said defendant was thereby required to appear. And I do hereby request the sheriff of Yorkshire and his county clerk to issue an attachment in this cause against the said defendant, and to direct the same to James Bland and James Turton, bailiffs specially to be appointed for the purpose of levying the same. And I do hereby undertake to indemnify and save harmless the said sheriff and his county clerk, of and from and against *all costs, charges, damages and expenses which they or either of them may sustain, expend, or be put unto, by reason of the execution of the said attachment, or any misconduct, negligence, or misbehaviour of, or by the said bailiffs so to be appointed, or either of them, in or about the same, or in anywise relating thereto. Dated this 20th day of July, in the year of our Lord 1843. (Signed) Hy. Wm. Dyson, [*564]

“ Agent for the above-named plaintiff.”

It was further objected on behalf of the defendant Copley, that the sheriff, being a judicial officer, was not liable for the misconduct of the bailiffs in not obeying the *supersedeas*. This objection was also overruled.

A verdict was entered for the plaintiff against all the defendants upon all the issues, except that taken upon the third plea : and upon that the verdict was also entered for the plaintiff against the defendant Bland only ; leave being reserved for the defendant Copley to move to enter a verdict for himself upon the points above mentioned.

Byles, Serjt., in Easter term last, obtained a rule nisi, upon the leave re-

served, or for a new trial, upon this point, that as the defendant Copley was found guilty generally, he must be taken to have been found guilty of the same act or matter in respect of which the defendant Bland was found guilty; but that was shown, under the new assignment, to have been an act or matter expressly forbidden by the defendant Copley.

Talfourd, Serjt., (with whom was *Pashley*,) now showed cause. Notwithstanding the *supersedeas*, the sheriff was responsible for the conversion by the bailiff. This proposition, though startling at first, is consistent with *565] the principle on which a sheriff is generally held responsible* for the acts of his officer. In *Saunderson v. Baker*, 3 Wils. 309, 2 W. Bl. 832,(a) two passages were cited from 2 Roll. Abr. 552, tit. *Trespass* (O), pl. 9 and 10,(b) in the first of which it is said—"If the sheriff makes a warrant to the bailiff of a franchise to take the goods of a man in execution, and he mistakes the goods and takes the goods of another man, the bailiff is the trespasser and not the sheriff." in the second—"If a man be arrested by the bailiffs of the sheriff, and thereupon he sheweth to them a *supersedeas* to discharge him, and the bailiffs refuse it, and afterwards detain him in prison, he shall have false imprisonment against the bailiffs, and not against the sheriff." But, notwithstanding these authorities—which would seem to be in favour of the defendant Copley in the present case—the court held that trespass lies against a sheriff for taking the goods of A. instead of the goods of B. by the sheriff's bailiffs, under his warrant upon a *feri facias*. In that case there was certainly some evidence of recognition by the sheriff; but *Tyler v. Johnson*, and other cases, there cited by NARES, J., establish that a sheriff is responsible for a mistake of his bailiff. [CRESWELL, J. In *Tyler v. Johnson* the writ was to arrest a man in Staffordshire, and the bailiff arrested him in Worcestershire; he was there acting in pursuance of the authority from the sheriff, though not according to it. It is like the cases where parties have been held entitled to the protection of a statute. In the first cited case from Roll. Abr., it appears that the bailiff was the bailiff of a franchise. (His lordship also referred to the same authorities from Roll. Abr. as cited in Com. Dig., tit. *Trespass*, (C. 1.)) TINDAL, C. J. The bailiff of a franchise is not the *566] immediate servant of the sheriff.](c) There is, no doubt, that *distinction. But the proposition contended for has been established by later cases. *Parrot v. Mumford*, 2 Esp. N. P. C. 585; *Price v. Peek*, 1 N. C. 380, 1 Scott, 205; *Smart v. Hutton*, 8 A. & E. 568, n., 2 N. & M. 426; *Woodgate v. Knatchbull*, 2 T. R. 148; *Balme v. Hutton*, 9 Bingh. 471, 3 Mo. & Sc. 1, 1 C. & M. 262, 2 Tyrwh. 620. In *Raphael v. Goodman*, 8 A. & E. 565, 3 N. & P. 547, the sheriff was even held liable for the fraud of his officer. [TINDAL, C. J. How can the detainer of the goods here after the *supersedeas* be said to be an execution of the writ of

(a) See the observations on these different reports, 1 Dougl. 43, and ib. n. 12.

(b) And see 20 Vin. 458, pl. 10, in marg.

(c) Vide per Lord Mansfield, C. J. in *Arkworth v. Kempe*, 1 Dougl. 42.

attachment?'] The only object of the attachment was to compel an appearance, and as soon as the appearance was entered the attachment was at an end. The bailiff takes the goods by the sheriff's authority; and if he afterwards keep them, although ordered to give them up, he does so *under or by virtue of* that authority. [CRESSWELL, J. It seems at most to be a mere nonfeasance on the part of the sheriff. He does not deliver back the goods. But he orders his bailiffs to deliver them back. There is no conversion up to that time. The only evidence of conversion afterwards is the refusal of the bailiffs to deliver back the goods; but as the sheriff had ordered them to give them up, how can you say that the refusal of the bailiffs is evidence of a conversion by the sheriff?'] The original power of control over the goods was derived from the sheriff. There are many cases in which a master is held liable for the acts of his servant, although the latter may be expressly ordered not to do them. As if a coachman were driving his master, and were ordered not to drive so fast, but he nevertheless continued to do so, and an accident occurred in consequence, the master would be responsible for the injury. [CRESSWELL, J. In that case the coachman would still be driving *for his *master*, though driving badly.] So, here it is submitted the [*567 bailiffs were holding for the sheriff, though holding improperly. They set up no claim of their own to the property. What they did was done under colour of the attachment. They disregarded the *supersedeas*. [TINDAL, C. J. The point in question seems to be, whether the effect of the *supersedeas* is not to nullify the writ of attachment, so that the bailiff is no longer bailiff.]

The learned serjeant also contended, that the sheriff, though judge of the county court, was not acting as a judicial officer in the issuing of merely ministerial process; (a) *Holroyd v. Breare*, 2 B. & A. 473; *Tinsley v. Nassau*, Moo. & Malk. 52, 2 Carr. & P. 582; Dalt. Sheriff, pp. 406, 407, 416, Com. Dig. tit. *County*, (C. 2, C. 9.) Y. B. 6 Ed. 4, 3 b, M. 6 E. 4, fo. 3, pl. 9, 2 Inst. 225, 312; or that at any rate by taking an indemnity he had lost the protection of the judicial character: *Bradley v. Carr*, ante, Vol. III. p. 221, 3 Sc. N. R. 523; *Tunno v. Morris*, 2 C., M. & R. 298, 5 Tyrwh. 949, 4 Dowl. P. C. 224: and also that the indemnity was admissible without a stamp under the 55 G. 3, c. 184, sched. Part I. tit. *Agreement*; *Orford v. Cole*, 2 Stark. N. P. C. 351. [CRESSWELL, J., on this point referred to *Shepherd v. Wheble*, 8 Carr. & P. 534.]

Byles, Serjt., (with whom was *Hugh Hill*), in support of the rule. It is important to consider the state of the pleadings. The issuing of the *supersedeas*, by which the defendant Copley commanded the other two defendants as his bailiffs to deliver up the goods to the plaintiff, appears on the record. There is a joint verdict against Copley and Bland; the plaintiff therefore is seeking to charge the sheriff for not delivering up the goods which he had directed should be given up. The authorities *cited [*568

(a) The judgment of the court having been given upon the first point only, the argument upon the second and third points is not reported.

from Roll. Abr. have never been overruled. In *Cook v. Palmer*, 6 B. & C. 739, 9 D. & R. 723, the sheriff was held not responsible where his officer had transgressed his duty. The same principle was acted upon in *Crowder v. Long*, 8 B. & C. 598, 3 Mann. & R. 17, where LITLEDAL, J., said, "The rule is, that the act of the officer in the execution of the authority received from the sheriff, is the act of the sheriff. But here, the act done by the officer was an act done, not in pursuance, but in direct contravention, of that authority." So, in this case, the detention of the goods by the bailiff was in direct contravention of the *supersedeas*. [COLTMAN, J. In *Crowder v. Long*, which was an action for money had and received by the sheriff against an execution-creditor, it appeared that the improper act of the officer had been done by the desire of the defendant.] That is not the ground upon which LITLEDAL, J., founds his judgment. The present case however goes further than those cited, by reason of the issue. Upon the pleadings as they stand, it is an absolute impossibility that the sheriff should be found guilty of the conversion. [COLTMAN, J. Not an absolute impossibility; for he might have revoked the *supersedeas*.] It would be impossible, if he did nothing more than is shown upon the record. It further appeared from the evidence, that the sheriff, by granting the rule, by which the then plaintiff was required to give up the goods, repudiated the act of the bailiffs. In all the cases relied upon by the other side, the bailiff, though in the wrong, thought he was acting under the authority of the sheriff. Here, the bailiff was acting in opposition to such authority. (The learned serjeant was then stopped by the court.)

TINDAL, C. J. It appears to me that the rule for entering a verdict for
 •569] the defendant Copley must be *made absolute. The question is, whether the sheriff is shown to have been guilty of a conversion—whether the refusal to deliver the goods is to be considered as the joint act of the sheriff and the bailiff, or as the act of the bailiff alone. It appears to me that it was the act of the bailiff alone; and I think that at that time he was not acting as the servant to the sheriff. The sheriff, generally speaking, acts by his servants; and he is not allowed, when they act by his authority, to put his responsibility upon their shoulders. In this case, the warrant issued by the sheriff authorized the bailiff, as his servant, to seize the goods in question. After that, however, came the *supersedeas*, which made the previous writ, and also the warrant, inoperative. The consequence is, that although the sheriff may have been liable for the original taking, and for all that was done up to the time of the *supersedeas*, he is not responsible for what was done afterwards, that being done by one of the bailiffs upon his own authority. The *supersedeas* is a direct command to the bailiffs to deliver up the goods; and it would be making the sheriff liable for an act of his servant after the authority of that servant had been determined, if we were to hold the sheriff liable. The passage from 2 Roll. Abr. *Trespass* (O), pl. 10, is an express authority on the point, which has never been overruled; and it applies to goods as well as to persons.

COLTMAN, J. I should have hesitated a considerable time before I assented to the proposition that in this case the sheriff was not liable for the act of his bailiff, but for the authority from Rolle's Abridgment, which my lord has just referred to, and which I consider to be even stronger than the present case. Here, the sheriff appears to me to be in a better situation than where the process issues from a superior court. In that case he is bound to execute it. But here, the sheriff is *a judge; he issues his process to the bailiffs, who act upon it on their own behalf, and are bound to do so. The sheriff, if liable at all, is not liable for issuing the process, but for identifying himself with the bailiffs by reason of the indemnity. The case from Rolle's Abridgment seems a decisive authority that he is not liable for any acts of the bailiffs after the issuing of the *superseas*. [*570]

CRESSWELL, J. It is not necessary to pronounce any opinion as to the position of the sheriff in the county court; though there are strong authorities to show that he is a judicial officer. The sheriff issues process as of the court; and if it is not issued by the court, it would be as though none were issued. But it is not necessary to consider whether the sheriff, in this case, might have rendered himself liable for a wrongful act in the first instance; because, as the pleadings stand, it is by his own order to do what was right, that he is sought to be made liable for the bailiff's doing something that was wrong. The replication, too, it is to be observed, does not allege a conversion, but only sets out evidence of a conversion. (a) The authority from Rolle's Abridgment appears to me decisive; and no doubt has ever been thrown upon it. Rule absolute.

(a) The replication does not adopt the conversion, confessed in the plea, but professes to new-assign a different conversion. But as the replication only sets out evidence without alleging a conversion in fact, it seems to be not merely a departure from the declaration, but to negative the cause of action.

*HUXLEY v. BULL. June 8.

[*571]

In debt, by A. against B., for goods sold, B. pleaded, that before action, C., the agent of A., in that behalf, obtained from B., for, and on account of the debt, a bill of exchange accepted by B., payable at a period which had not elapsed, and that C. handed over to A., and A., before action brought, received the same for, and on account of the debt, &c. Replication that C. received the bill without the consent, knowledge, or authority of A., and that afterwards, and before action, A. gave notice thereof to B.; and that afterwards, and within a reasonable time, the bill was returned to B. by C. Rejoinder, that C. received the bill with the consent, &c. of A.

The (so called) bill was taken (a blank being left for the name of the drawer) without the plaintiff's authority, and the plaintiff, by letter to the defendant, repudiated the transaction, but did not return the bill.

The jury having returned a verdict for the defendant, the court granted a new trial without costs; but

Held, that the plain iff was not entitled to judgment *non obstante veredicto*.

DEBT for goods sold and delivered, and for money due upon an account stated.

The defendant pleaded,—first, never indebted, on which issue was

joined; secondly, as to 59*l.* 17*s.* 4*d.*, parcel, &c., and the debt and causes of action in respect thereof; that after the accruing of the debt and causes of action in the declaration mentioned, as to the said sum of 59*l.* 17*s.* 4*d.*, parcel, &c., and before the commencement of the suit, to wit, on, &c., one George Hibbert, the agent of the plaintiff in that behalf, obtained and procured from the plaintiff, for and on account of the said sum of 59*l.* 17*s.* 4*d.*, parcel, &c., and the debt and causes of action in the declaration mentioned in respect thereof, a certain bill of exchange in writing for the sum of 59*l.* 17*s.* bearing date a certain day and year, to wit, &c., and accepted by the defendant, and payable three months after the date thereof (which period had not yet elapsed); which bill of exchange Hibbert then delivered and handed over to the plaintiff, and the plaintiff then before the commencement of the suit, to wit, on, &c., took and received the same *for and on account of* the said sum of 59*l.* 17*s.* 4*d.* paid, &c. as aforesaid, and the debt and causes of action, &c.: verification.

*572] *Replication to the second plea, that Hibbert took and received the said bill from the defendant, without the consent or knowledge of the plaintiff, and without any authority from the plaintiff in that behalf; and that afterwards, and before the commencement of the suit, and within a reasonable time in that behalf, to wit, on, &c., the plaintiff caused notice of the premises to be, and notice of the premises was then given to, and received by, the defendant; and that afterwards, *and within a reasonable time in that behalf*, to wit, on the day so given last aforesaid, the said bill was returned by the plaintiff to the defendant: verification.

Rejoinder that Hibbert took and received the said bill from the defendant with the consent, knowledge, and authority of the plaintiff, in manner and form as the defendant had in his said plea in that behalf alleged; concluding to the country; on which issue was joined.

At the trial before Lord DENMAN, C. J., at the last Surrey assizes, the following facts appeared.

The plaintiff was a wholesale tobacconist resident in London; the defendant was a retail tobacconist at Birmingham, and was indebted to the plaintiff in the sum of 59*l.* 17*s.* 4*d.* for goods supplied to him upon credit. George Hibbert, the plaintiff's traveller, called on the defendant at the time that the credit expired, and demanded payment. The defendant requested him to take a bill at three months, which Hibbert consented to do; and a bill was accordingly drawn at that period for 59*l.* 17*s.*, and accepted by the defendant, a blank being left for the plaintiff to insert his name as drawer. Hibbert, who was called as a witness, stated that he had no authority from the plaintiff to receive bills. The plaintiff, as soon as he received the document in question, wrote the following letter to the defendant:—

London, December 15th, 1843.

*573] “Sir,—It is contrary to my rules to take bills, and *I cannot receive your acceptance in payment of my account: it is now over-

due; and I must request a remittance of part or the whole amount as soon as possible, when I will return your acceptance."

The defendant replied as follows:—

"*Birmingham, December 16th, 1843.*

"Sir,—In reply to yours of yesterday's date, I beg to say, that although it may be contrary to your rules to take bills, still I consider, that as your traveller is your representative, and as he took my bill in payment of your account, and signed my ledger to that effect, I consider the account closed between us. The bill will be honoured when at maturity; and as your representative made no objection to it at the time, I must say I was rather surprised at the contents of your letter."

The document was not in fact returned to the defendant, but was produced at the trial in the same state in which it had been given to Hibbert; (a) and it was proved that the plaintiff had said that he would keep it until he got his money.

The learned judge expressed an opinion that the plaintiff could not be taken to have assented to receive the bill after the evidence of his express dissent; but he left it to the jury to say whether or not the plaintiff had ratified the arrangement entered into by Hibbert. The jury returned a verdict for the defendant upon the second issue.

Sir *T. Wilde*, Serjt., in last Easter term, (15th April,) obtained a rule nisi for a new trial, upon the ground of *misdirection, inasmuch as there was *no* evidence to leave to the jury to support the second plea; [*574 or that the verdict was against evidence; or for judgment *non obstante veredicto*. Upon the last point he referred the court to *Kearslake v. Morgan*, 5 T. R. 513; *Crisp v. Griffiths*, 2 C., M. & R. 159, 5 Tyrwh. 619; *Simon v. Lloyd*, 2 C., M. & R. 187, 5 Tyrwh. 701, 3 Dowl. P. C. 813; and *Mercer v. Cheese*, ante, vol. iv. p. 804, 5 Scott, N. R. 664.

Talfourd, Serjt., (with whom was *Peacock*,) now showed cause. There was clearly *some* evidence to go to the jury of the plaintiff's having ratified the arrangement entered into by Hibbert. If he intended to repudiate it, he ought to have returned the bill. It was therefore a question for the jury.

There is no ground for the plaintiff's having judgment *non obstante veredicto*. It is true that the giving of a bill of exchange is no payment of a debt till the bill itself is paid; but it is a good plea to state that a bill was given and taken "for and on account of" the debt. It is not a plea of satisfaction, but merely shows that the remedy is *suspended*. *Kearslake v. Morgan* and *Mercer v. Cheese* are both authorities for the defendant upon this point. At any rate the plaintiff having pleaded over, and joined issue, even though it may be upon an immaterial issue, is not entitled to judg-

(a) The paper being produced in the same state in which it was received by Hibbert, i. e. without the name of any drawer, it seems extraordinary that the existence of a bill of exchange should have been admitted by the replication. On the other hand, if the plaintiff had affixed his name as drawer, it would have been a strong circumstance to show that he had sanctioned the arrangement made by his traveller.

ment *non obstante veredicto*. The most that he would be entitled to, would be an award of a *repleader*.

Byles, Serjt., (with whom was *Leach*,) in support of the rule. The second plea is certainly not materially distinguishable from the plea in *Mercer v. Cheese*; but the replication alleges that within a reasonable time the *575] bill was returned to the defendant. The issue is *taken upon the authority of *Hibbert* to receive the bill. On the whole record, therefore, it appears that the bill was returned before action brought. [CRESSWELL, J. No, it does not even appear that it was returned before plea pleaded.] It is stated that before the commencement of the suit, to wit, on the 15th of December, the defendant had notice, and that afterwards, to wit, on the day and year aforesaid, "the bill was returned." [CRESSWELL, J. That will not help you much.] It would appear at any rate that the bill was returned before judgment. In *Mercer v. Cheese* it did not appear, on the record, what had become of the bill; in this case it does. [TINDAL, C. J. But what became of it before action brought?] "Afterwards" must mean after some time mentioned that is material. [TINDAL, C. J. The plaintiff says that afterwards, and before the commencement of the suit, and within reasonable time, notice was given, and afterwards, and within reasonable time, the bill was returned; but he does not say—before the commencement of the suit. I think this is not a case for judgment *non obstante veredicto*; but the rule may be made absolute for a new trial as being a verdict against evidence.] At any rate the rule should be made absolute without payment of costs, as there was at most but a scintilla of evidence to go to the jury on behalf of the defendant, and the verdict was clearly perverse. [TINDAL, C. J. To make it so, the jury should have been told to find the verdict the other way. The fairest course, perhaps, will be that the rule should be made absolute for a new trial without costs, unless the debt is paid within a week.]

Per curiam;

Rule absolute accordingly.

*576] *SURPLICE v. FARNSWORTH and Another. June 3.

In an agreement for a tenancy of buildings for a term, the landlord to do the repairs, there is no implied condition that the tenant may quit if the repairs are not done.(a)

ASSUMPSIT, for use and occupation. Plea non assumpsit.

At the trial before GURNEY, B., at the last assizes for the county of Nottingham, the following facts appeared:

The defendants were yearly tenants to the plaintiff of certain malt-offices, at the rent of 25*l.*, payable half-yearly. They entered into possession at Michaelmas, 1838. In March, 1843, they quitted the premises, upon the

(a) But upon a covenant to allow out of the rent so much as may be necessary to be expended in repairs, evidence of money necessarily expended in repairs will be admissible under a plea of *riens in arere*. *Wood v. Rock*, 1 Alcock & Napier, 57.

ground that they were not in a fit state of repair for the purposes of malting, and they tendered the keys to the plaintiff's agent, who refused to receive them. On one occasion during the tenancy the defendants did some repairs to the premises, and deducted the amount from the rent.

The learned judge directed the jury to find a verdict for the plaintiff; but he also desired them to state whether, in their opinion, the premises were in a fit state for the purposes of malting at the time they were given up. The jury having found that the premises were not in a fit state for the purposes of malting, the verdict was entered for the plaintiff, leave being reserved to the defendants to move to set it aside and enter a verdict for themselves.

Byles, Serjt., in last term, obtained a rule nisi for this purpose, upon the authority of *Edwards v. Etherington*, Ryan & Mood. 268, 7 D. & R. 117; *Collins v. Barrow*, 1 Mood. & Rob. 112; *Salisbury v. Marshal*, 4 C. & P. 65; and *Smith v. Marrrable*, Carr. & Marshm. 479, 11 M. & W. 5. He also mentioned *Sutton v. Temple*, 12 M. & W. 52; and *Hart v. Windsor*, 12 M. & W. 68.

**Clarke*, Serjt., now showed cause. The question in this case [*577 is, whether use and occupation will lie in respect of premises which are out of repair, or whether a tenant is entitled to give up possession upon that ground. There was no stipulation here that the landlord should repair; nor does it appear that he was, in fact, called upon to repair, though the tenants were, on one occasion, allowed to deduct the amount of some repairs, done by them, from the rent. The case of *Edwards v. Hetherington* was decided without argument, the rule for a new trial having been refused. [TINDAL, C. J. It might be said that the facts in that case amounted to a *quasi* eviction. *Collins v. Barrow* was only a nisi prius case, and the verdict being for the plaintiff, (in the action for use and occupation,) there was no opportunity of reviewing the ruling of the learned judge. In *Salisbury v. Marshal*, which was tried before TINDAL, C. J., the old authorities were not brought before his lordship. *Smith v. Marrrable* was the case of a furnished house, the beds in which, being part of the furniture, were infested with bugs to such an extent as to render them unfit for occupation; and the contract for occupation being entire, it was considered that the plaintiff could not recover for the occupation of that which was, in fact, not capable of any beneficial occupation. All these cases were before the court of Exchequer in *Sutton v. Temple* and *Hart v. Windsor*; and in the latter the first three were denied to be law; and *Smith v. Marrrable* was acquiesced in only upon the ground stated. If any contract as to repairs could be implied from the facts of the present case, it would be a contract, not that the landlord should repair, but that the tenant might repair and the landlord would allow him to deduct the amount from his rent. Such a contract clearly would not justify the tenant in quitting if the premises were out of repair. If this could be done by *a tenant [*578 from year to year, a person holding for a longer term might do the

same. Even if there were an implied contract to repair by the landlord, the breach of that engagement would not entitle the tenant to determine the tenancy. This was not like the case of a surrender, as in *Whitehead v. Clifford*, 5 Taunt. 518.

Byles, Serjt., in support of the rule. The form of the present action is material. It is for the use and occupation of the premises, not debt upon a *demise*. The question is, whether, under all the circumstances, the defendants had such an use and occupation as will sustain the action, the premises being shown to be in such a state as to render them unfit for the purposes for which they were taken, and the landlord being bound to repair them. It was shown that the repairs had previously been done at his expense. [CRESSWELL, J. Only on one occasion. There may have been other repairs. And the circumstances under which the landlord allowed the repairs to be deducted from the rent on that occasion, do not appear. TINDAL, C. J. Suppose the landlord were bound to repair, what then?] In that case there would be an implied condition, at all events, in an action for use and occupation, that if the premises were not repaired, the tenant might give up possession. In *Salisbury v. Marshal* there was an understanding between the parties that the premises should be put into proper repair, it is to be presumed, by the landlord. [CRESSWELL, J. That was before the tenant went in.] He did enter, however, and his complaint was that the landlord did not continue to repair. [TINDAL, C. J. What I said in that case was, that if there had been a separate agreement to do the repairs, then the not having done them would furnish no defence to the *action. But I thought the agreement formed a condition precedent.] If the present rule is discharged, the court must overrule *Edwards v. Hetherington*. That case was not decided by the court of K. B. upon the ground of eviction. ABBOTT, C. J., expressly puts it upon the ground that the tenant had no beneficial occupation: 7 D. & R. 118. It did not appear there that the landlord was under any contract to repair, as it is submitted he is here. It is therefore a stronger authority for the defendants. In *Collins v. Barrow* the tenant was bound to repair, but BAYLEY, B., ruled that as the premises were in an unhealthy state owing to defective drainage, he was justified in quitting them. In *Cowie v. Goodwin*, 9 C. & P. 378, which was an action for use and occupation, the defendant occupied certain apartments in a house belonging to the plaintiff, and was under notice to quit at Michaelmas. He had frequently complained of the bad state of the premises; and a few days before Midsummer the wall of a privy on the ground floor gave way, and the kitchen was overflowed with the filth, which also impregnated the water of a pump in the kitchen. The tenant immediately began to look out for other premises, but he did not actually quit till nearly six weeks after Midsummer. He paid the rent up to Midsummer into court, the action being brought for the rent up to Michaelmas; but Lord DENMAN, C. J., said, he should ask the jury whether the premises were unfit for proper and comfortable occupation.

and if the defendant had *bonâ fide* quitted the apartments as soon as he could procure others; and the jury having found both questions in the affirmative, the plaintiff elected to be nonsuited; so that perhaps it cannot be said that direction was acquiesced in.^(a) [CRESWELL, J. Probably *some of the facts are omitted in the report for brevity's sake. TINDAL, C. J. It may have been a case of ready-furnished apartments. [*580

The injury occurred in another part of the house which was not under the control of the tenant.] *Smith v. Marrable* is not overruled either by *Sutton v. Temple* or by *Hart v. Windsor*. It was distinguished in both cases. [CRESWELL, J. *Smith v. Marrable* does not decide what would have been the state of things, if the bugs had come in after the tenant had taken possession of the house.] The case was not decided upon the ground of fraud *Hart v. Windsor*, which is the case upon which the present plaintiff must mainly rely, decides that there was no implied contract that the landlord should repair and keep the premises in a tenantable state, and therefore that no condition to that effect could be implied; but that does not apply to a case where there is an express contract to that effect. That also was a case of debt on a demise, in which all the terms of the demise must be set out; and the question was, whether the court could import a condition into those terms. That case therefore does not show that where there is an express contract to repair, such a condition may not be implied. If such a contract existed and the premises were burnt down, the landlord would be bound to rebuild. [CRESWELL, J. There are some authorities referred to by PARKE, B., in *Hart v. Windsor*, from Brooke's Abridgment, tit. *Dette*, pl. 18 and 72, 12 M. & W. 84,^(b) *to show that [*581 even where the lessor is bound to repair and does not, the tenant

(a) It appears from a note to the case, that a new trial was moved for on the ground of misdirection, but that the court refused to grant a rule nisi.

(b) The authorities had been cited by Jos. Addison in the argument. Bro. Abr. tit. *Dette*, pl. 18, refers to 27 H. 6, 10, where the case is thus reported: "In a plaint of debt at Guildhall, London, upon the lease of a house, the defendant said that action he ought not to have, because he said that the custom of London was this, that the lessor ought sufficiently to repair that which he demises, during the lease, and so had been from time whereof, &c.; and he says that the house, by tempest of water and wind, a long time before the rent was in arrear, was uncovered, and had become so ruinous that he could not dwell in his house, or take any profits of the house, and a long time before the rent was payable he required the plaintiff to repair the house and he refused, wherefore we waived the house before the day that the rent was payable, because we could not dwell therein. Verification and prayer of judgment. To which plea the plaintiff demurred.

Wangford, Serjt. If the plaintiff had ejected the defendant before the day of payment, that would have been a good plea; so here, inasmuch as the house is not repaired he cannot dwell therein, which is the act and default of the plaintiff; and if the rent had been reserved in this form, that he the plaintiff should sufficiently repair the house during the term, and that then he the defendant should pay annually so much, in this case it would have been a good plea to have said that the house was ruinous, and that he had not repaired the house according to the lease, and had demanded judgment of action; this would have been a good plea; so here. To which it was answered, that this latter case was not like the former case, because there the rent was reserved upon condition which ought to be performed before he should pay any thing, but the first case is not conditional, but a covenant, upon which, by the custom, he might have an action of covenant, if it was made by indenture. And the case of the ouster is not like this case, for when the lessor ousts the lessee, the lessor is himself seized, but if the lessee renounces his tenancy, the lessor is not thereby in possession, but the lessee is still possessed; and if the

cannot quit.] Those cases were before the action for use and occupation was given by statute. *582] [COLTMAN, J. Do you admit that debt on the demise would still lie? For if so, the *tenancy must* be still continuing.] *Hart v. Windsor* would seem to show that. But in debt on demise the defendant might plead in confession of the demise and avoidance thereof by showing the non-repair by the landlord. In assumpsit for use and occupation, the whole question is at large under *583] non-assumpsit. In 1 Roll. Abr. tit. *Apportionment* (C), (a) it is said, "If a man lease land for life or years, rendering rent, and afterwards part of the land becomes covered with *fresh water*, this will not make an apportionment of the rent, because the soil remains, and the lessee alone shall have the fish in the water, and he may, by ordinary intendment, regain the land. But, if a man lease for life or years, rendering rent, and part of the land becomes covered by *the sea*, this will make an apportionment of the rent, because, though the soil remains to them, yet the water is part of the sea, and so is common to any man to fish there as well as to the lessee, and there is no possibility, by ordinary intendment, to regain

lessor chooses to enter, the lessee shall have a good action against him, and so it is not like. And, Sir, notwithstanding the lessee may have an action of covenant against the lessor, and so recover his damages, that shall not deprive (*ne extorter*) the plaintiff of his action, for a covenant shall not oust (*ne extorter*) another action, but a thing done by a man shall oust (*extorter*) the same man from another action, as in a writ of waste, if the plaintiff himself did the waste, and so is the diversity. And so the opinion of the court was that the plaintiff should recover. And therefore the parties agreed, &c. T. 27 H. 6, fo. 10, pl. 6, Bro. Abr. tit. *Dette*, pl. 72, refers to 14 H. 4, 27, where the case is thus reported. "In a writ of debt the plaintiff counted that he demised to the defendant certain land for a term of years, rendering certain rent at certain terms, and showed how the rent was in arrear, &c., and often had he prayed him to pay, &c. Chein, Serjt. The plaintiff demised the land, as he has said, by this deed, which is here, rendering to him the said rent; and by the deed he is bound to repair the houses at the beginning of the term; and after they are sufficiently repaired, we are to sustain them at our cost until the end of the term, &c. Whereupon, at the beginning of the term, there were certain houses which were uncovered, and not repaired; whereupon he commanded us to amend those houses which were uncovered, and not repaired; whereupon he commanded us to repair those houses with the rent, and we did it, and expended the same rent in the cost of the repair of the same houses, and more; wherefore we do not intend that action he ought to have. Hill, J. You have shown that the rent is reserved by a deed, and have acknowledged the duty; wherefore now to say that you have put the same rent upon the cost of the houses by his command, and of that you show nothing, (produce no deed,) I cannot see how you can be allowed to say that. But *rien urrere*, or levied by distress, you may well say, notwithstanding the specialty. Chein. He has counted upon a lease without deed, wherefore we will not show a deed. Hill. Still it is all one if you acknowledge the duty, although the lease was without deed. Hankford, J., to Chein. If I lend you certain money, and afterwards bring a writ of debt against you, will it be a plea for you to say that you have paid another person the same money by my command, without showing any thing of it; *quasi diceret non*; wherefore no more so here. Chein durst not demur, but said he would imparl, &c. H. 14 H. 4, fo. 27, pl. 35. And see *Stafford v. Cantlow*, M. 34, H. 6, fo. 17, pl. 32.

But in T. 11 R. 2, Fitz. Abr. tit. *Barre*, pl. 242, is the following case:—"Debt upon a lease for a term of years. Pynchebek, Serjt. The defendant demised to us the said land by the deed which here is; and by the same deed he granted to us that we should repair the same lands when they should be ruinous, at the cost of the plaintiff; and he said that they were ruinous, and showed how, and that he repaired the said houses and lands with the same rent. Judgment, if action. Markham, Serjt. The deed does not provide that he shall repair the houses and land with the rent; wherefore judgment, and we pray our debt, &c. Belknap, C. J. He has said that the house was ruinous and feeble; wherefore answer. Markham. He has expended in repairs only 20s., and we pray our debt of the remainder."

(a) Pl. 1 and 2, translated 3 Vin. Abr. 14, same title.

it.”(a) So that a distinction is made between an overflow by the sea or by fresh water; the former case being considered equivalent to an eviction. Here, there is no impossibility to perform the contract on the part of the landlord. If it had been agreed that the term should continue, the plaintiff would certainly have been entitled to recover for the value of the premises. Would use and occupation lie for a house which had been burnt down, or for an apartment in a house that had been burnt, where nothing was left for the tenant to occupy? [TINDAL, C. J. In such a case there might be a distinction whether or not the burning was by the act of God.(b) Have you considered the case of *Izon v. Gorton*? 5 N. & C. 501, 7 Scott, 537. It seems very strong against you upon the latter point. The defendants there, as tenants from year to year, occupied a second floor, *which, during [584 their occupation, was consumed by an accidental fire; and it was held that notwithstanding the destruction of the premises, they were liable to an action for use and occupation for the period which elapsed between the fire and the regular determination of the tenancy.] Did it appear there that the parties had gone out of possession? [TINDAL, C. J. As much so as people usually do when their houses are burnt down. CRESSWELL, J. And even more so, for being only tenants of an upper floor, they had not even the land.] That case appears to be at variance with *Edwards v. Hetherington*. Here, at any rate the tenants were anxious, and offered to give up possession.

TINDAL, C. J. It seems to be admitted that this rule cannot be sustained, unless it be shown that the ground upon which it was obtained can be supported; namely, that if the landlord is bound to repair the premises during the tenancy, there is an implied condition that should he fail in the performance of his contract, the tenant may throw up the tenancy. No authority has been cited to show that such a contract to repair implies such a condition. If the contract were under seal, the condition that the tenant upon the breach thereof might determine the tenancy, could not be implied. Where it is intended that a covenant shall operate as a condition, there is always an express covenant to that effect; as in the case of re-entry by the lessor for breach of covenant by the lessee. I am not aware of any legal principle, that an agreement by parol is in this respect to be construed differently from one under seal. Assuming, therefore, that there was an agreement in this case by the landlord to repair—though none was actually proved—there is no principle of law to authorize the importing of the condition contended for. In such a case the tenant will have his remedy over against his *landlord; but the relation of landlord [585 and tenant still subsists between them. In *Salisbury v. Marshal* there was something to be done by the landlord before the tenant entered.

(a) Dyer, 56 a (*Richards, le Taverner's case*) is referred to. But the former point is not there mentioned. And upon the latter there was a division of opinion. See also Bac. Abr. tit. *Rent* (M), 2.

(b) See *Richards, le Taverner's case, ut supra*, Rol. Abr. and Vin. Abr. tit. *Apportionment* (C), pl. 3, Bac. Abr. tit. *Rent* (M), 2. But see Dyer, 33 a, pl. 11.

That looks more like a condition, and if it was not performed then the whole matter would fall to the ground. And though the tenant there entered into possession, it was upon the assumption that the landlord would go on with the repairs; but the latter failed to do so, and did not perform what he had agreed to do in order to enable the tenant to enter. After the case of *Izon v. Gorton* it seems impossible to hold, in this case, that the tenancy did not continue.

COLTMAN, J. I am of the same opinion. Some of the cases, such as *Salisbury v. Marshal*, and *Edwards v. Hetherington*, may, I think, be distinguished from the present. In the case of *Currie v. Goodwin*, the nuisance was actually prejudicial to health. But if not distinguishable, they seem to be overruled by *Hart v. Windsor*; to which I fully adhere. I think that the circumstance of a landlord being bound to repair, does not entitle the tenant to quit upon the failure of the landlord to perform his contract. It is said that *Hart v. Windsor* is distinguishable from the present case, inasmuch as it was an action on a demise, and this is for use and occupation; but I do not think there is any thing in the distinction. If debt upon a demise lies, the tenancy still continues; so, in use and occupation, although there may be no actual occupation, there must be what, in law, amounts to a holding.

CRESSWELL, J. It seems to me also that the rule must be discharged. This is an action for use and occupation, founded upon an agreement to hold for a term not yet expired. It is said that this agreement was put an *586] end to by the non-performance of an *implied condition on the part of the landlord to repair the premises. It seems to be admitted that no condition could be implied if the contract were written or under seal. And there is not more reason—there is even less—to import such a condition into the present contract.(a)

(a) Where a landlord is bound to repair in certain cases, and the tenant, in one of those cases, from a sudden accident, is obliged to make those repairs to prevent further mischief, if an action be brought against the tenant for the rent, a court of equity will not interpose; because the tenant, if entitled to charge the landlord with the repairs, may set off in the action the money advanced by him for the repairs, as money paid to the use of the landlord. *Waters v. Weigall*, 2 Anstr. 575.

CLOSE v. PHIPPS. June 4.

The solicitor of a mortgagee, with a power of sale, refuses to desist from selling unless the mortgagor will pay expenses, with which he is not properly chargeable. Held, that money paid under such compulsion may be recovered back.(a)

DEBT, for money had and received, and upon an account stated. Plea, never indebted.

At the trial, before CRESSWELL, J., at the last Somersetshire assizes, the following facts appeared.

(a) Vide post, 589 (a).

The plaintiff was the administratrix *cum testamento annexo* of her late husband, who had mortgaged certain property to one Welch to secure 1000*l.* and interest. In April, 1843, the defendant, as the attorney for Welch, called in the mortgage-money, and gave the plaintiff notice, that if it were not immediately paid he should proceed to sell the property under a power contained in the mortgage deed. The plaintiff thereupon employed one Vining, an attorney, to obtain another loan in order to enable her to pay off the mortgage; but he did not succeed in so doing. In the mean time the defendant, on behalf of Welch, advertised the property *for sale on [587 the 2d of October following. On the 20th of September one James, another attorney employed by the plaintiff, called, on her behalf, upon the defendant in order to pay off the principal and interest due to Welch, and the defendant's costs. The defendant claimed the further sums—of 15*l.*, for three months' interest in advance; (a) 29*l.* 8*s.* 10*d.*, alleged to have been paid by the defendant to Vining for his costs; and 13*s.* 4*d.* which the defendant claimed as due to him from the plaintiff's son, who had some interest in the property. The defendant refused to stop the sale or deliver up the deeds, unless the amount (45*l.* 2*s.* 2*d.*) was paid to him. That sum was accordingly paid under protest; and the present action was brought to recover it back.

It was contended, on the part of the defendant, that the plaintiff could not recover the money, at least in the present form of action, as it had been paid with a full knowledge of all the facts, and, therefore, must be taken to have been paid voluntarily. The learned judge was of opinion that the plaintiff was entitled to recover, and directed a verdict to be entered for her for the full amount, but reserved leave to the defendant to move to enter a nonsuit or to reduce the damages.

Channell, Serjt., in last Easter term, obtained a rule nisi accordingly.

Atcherley, Serjt., now showed cause. As a general rule it is undoubtedly true, as established by *Bilbie v. Lumley*, 2 East, 469, and that class of cases, that money paid with a full knowledge of all the facts cannot be recovered back. So, where money has been paid under a legal adjudication upon the precise point. But the present case falls within a third class of cases, in which it is held that, *where money is paid, though [588 with knowledge or means of knowledge of all the facts, but by compulsion, such as duress of the person or of goods, it may be recovered back. It has been always held that a bond or agreement might be avoided by reason of duress of the person; although some doubts appear to have been entertained whether the same rule applied where there was only duress of goods. In *Skeate v. Beale*, 11 A. & E. 983, 3 P. & D. 597, which was an action on an agreement to pay money, the defendant pleaded that the plaintiff had distrained upon his goods for more than was due, and threat-

(a) To countervail the six months' notice to which the mortgagee is entitled, when the mortgagor, after suffering the stipulated day to pass, wishes to pay off the mortgage. Et vide post, 589.

ened, and was about to sell the goods, whereupon the defendant made the agreement to avoid such sale. The plea was held bad; but the court, in giving judgment, pointed out that there might be a difference where an action for money had and received was brought to recover money paid under such circumstances and under protest. And in *Astley v. Reynolds*, 2 Stra. 915, it was expressly held that where money is extorted by duress of goods, it may be recovered in assumpsit for money had and received. This case was confirmed in *The Duke de Cadaval v. Collins*, 4 A. & E. 858, 6 N. & M. 324; and the principle was also recognised by the court of Queen's Bench this term, in *Wakefield v. Newbon*, since reported, 22 Law Journal, Q. B. 258. In *Knibbs v. Hall*, 1 Esp. N. P. C. 84, the money was not paid under protest; nor in *Lindon v. Hooper*, Cowp. 414, where, in the absence of such protest, an action for money had and received was held not to lie to recover back money paid for the release of cattle wrongfully taken as damage-feasant. [CRESSWELL, J. That was to avoid circuitry of action.(a) TINDAL, C. J. All the cases were brought before this court, *589] in *Parker v. The Great Western Railway Company*, antè, p. 253, 7 Scott, N. R. 835,(b) where the company having made unreasonable charges for the carriage of goods to one particular carrier, who had paid them under protest, we held that he might recover the amount of such payments in an action for money had and received, upon the ground that such payments were not voluntary, but were made in order to induce the company to do that which they were bound to do, without requiring such payments. In that case we relied a good deal upon ——— v. *Pigott*, c) which is strongly in point here. There is some course of practice, I believe in the court of Chancery, where a mortgagor wishes to pay off the mortgage-money suddenly, and the mortgagee does not wish to receive it, under which the matter is sent to the master to see upon what terms an arrangement can be made as to the payment of some interest in advance.] Here, the money was called in by the mortgagee.

Talfourd, Serjt., who was to have supported the rule, admitted he could not do so after the decision in *Parker v. The Great Western Railway Company*. (d)

(a) Vide per Patteson, J., in *Ashmole v. Wainwright*, 2 Q. B. 840.

(b) In that case the defendants were under a legal obligation to do that which they refused to do, except upon terms which they had no right to impose. In the principal case, the power of sale having become absolute, the mortgagee was under no legal obligation to accept the principal and interest, or to forego the sale upon any terms whatsoever. No action would have lain against the mortgagee, if, instead of exacting, he had refused to accept, the exorbitant sum charged, or any larger sum offered by the mortgagor, and had proceeded to sell. Supposing it, however, to be legal duress to enforce a legal right, against the exercise of which equity would relieve, *quære*, whether a court of law will take judicial notice of the rules of equity in such a case, (vide *Tucker v. Iumun*, antè, Vol. IV. p. 1049.) Notice is taken by courts of law of the equitable right of a mortgagor to redeem the estate after the title of the mortgagee has become absolute, so far as to treat a release of that right, (the equity of redemption,) as constituting a good consideration for a promise.

And see *Scholey v. Meurns*, 7 East, 148, 3 J. P. Smith, 145; *O'Kelly v. Sparkes*, in error 10 East, 369.

(c) Cited by Lord Kenyon, C. J., in *Cartwright v. Rowley*, 2 Esp. N. P. C. 723.

(d) See also *Ashmole v. Wainwright*, 2 Q. B. 837.

*TINDAL, C. J. This, I think, is quite as strong a case as that referred to. The money was obtained by, what the law would call, [**590* *duress*; as the plaintiff was obliged either to pay it, or to suffer her estate to be sold, and incur the expense and risk of a bill in equity.

Per curiam;

Rule discharged.

EDWARDS *v.* BATES and SAVERY. *June 8.*

Where money has been received by A. upon trust to make payments of an unascertained amount, and to pay the surplus to B., B. cannot sue A. for money had and received while the trusts remain open.

Semble, (per Cresswell, J.,) that where there is a contract between two parties under seal, the one cannot sue the other, as upon a simple contract, in respect of the subject-matter of such speciality contract.

B. assigned a debt due to him to A., in trust to pay, 1st, certain costs; secondly, a debt due from B. to C.; and, 3dly, to pay over the surplus to B. The amount of the costs and of the debt due from B. to C. had not been ascertained. *Held*, that B. could not maintain an action against A. for money had and received.

Held, also, that it was not necessary for A. to plead the deed, but that the defence was open to him under *never indebted*.

DEBT, for money had and received, and upon an account stated. Plea, *never indebted*.

At the trial, before MAULE, J., at the sittings for Middlesex, in last Easter term, it appeared that the action was brought to recover the sum of 527*l.* 19*s.* 6*d.*, being the balance of 735*l.* 3*s.* 8*d.* received by the defendants to the use, as alleged, of the plaintiff, after deducting 207*l.* 4*s.* 2*d.* in respect of a debt due from him to the Bank of England and South Wales District Joint Stock Banking Company, of which the defendant Bates was the manager, and the defendant Savery the solicitor.

The receipt of the money was not disputed by the defendants; but they put in a deed of assignment, bearing date the 23d of July, 1841, made between the plaintiff of the first part, one William Baker (the plaintiff's late partner) of the second part, and the defendants of the third part, whereby, after reciting that a debt of *2040*l.* had been proved in Chancery, [**591* in a suit there depending, to be due to the plaintiff and Baker in equal moieties from the estate of Edward Allies, deceased—that the partnership between the plaintiff and Baker had been dissolved—that the plaintiff had a banking account with the said banking company, and was indebted to them in a large sum of money, and that, at his request, they had agreed to continue to act as his bankers on the terms that his moiety in the debt should be assigned to the defendants as therein stated—it was witnessed, that for securing the payment of all money due, or to become due, from the plaintiff to the company, not exceeding, in the whole, on the balance of accounts, the principal sum of 500*l.*, the plaintiff assigned to the defendants his moiety of the debts upon certain trusts; provided always, that the defendants, out of the moneys to be received by them, in the first place, should deduct all costs, &c.; and in the next place, should pay to the com-

pany, or to their assigns, all sums due from the plaintiff to the company, not exceeding 500*l.*; and in the last place, should pay to the plaintiff the surplus, if any.

The money which the defendants received was received by them under the trusts of the deed; and it was objected on their behalf, that they were not liable at law, as the trusts were still subsisting; or that, even if an action would lie, the present action was misconceived in point of form, and that the plaintiff should have sued upon the covenant. The learned judge at first intimated an opinion, that these matters ought to have been pleaded; but, upon the authority of *Atty v. Parrish*, 1 N. R. 104, he nonsuited the plaintiff, reserving leave to him to move to enter a verdict, the amount of which was to be settled, if necessary, by an arbitrator.

*592] *Sir T. Wilde, Serjt., in the same term (April 30th) obtained a rule nisi accordingly: he referred to *Burnett v. Lynch*, 5 B. & C. 589, 8 D. & R. 368, and *Tilson v. The Warwick Gas Light Company*, 4 B. & C. 962, 7 D. & R. 376, in which the authority of *Atty v. Parish* had been doubted.

Talfourd, Serjt., (with whom was *Bull*,) now showed cause. The nonsuit was right. In every case, with one exception, (that of debt upon a demise,) where the rights of parties are defined by deed, and an action is brought in respect of those rights, neither assumpsit nor debt on simple contract will lie, but the action must be upon the deed itself; Com. Dig. tit. *Pleader* (O. 3); 1 Wms. Saund. 276, n. (1.) This principle is thoroughly recognised in *Atty v. Parish*; and in the judgment of the court delivered by Sir J. MANSFIELD, C. J., the reason for the exception before adverted to was given,—namely, that by the demise, an interest in the land has passed. *Warren v. Connett*, 8 Mod. 107, is an authority to the same effect. If in this case the plaintiff had declared upon the deed, he must have stated the receipt of the money by the defendants under the terms of the trust, and that after paying the necessary expenses and the debt due from him to the company, a surplus remained in the hands of the defendants, and then he must have assigned, as a breach, the non-payment over to him of the surplus. *Filmer v. Burnby*, ante, Vol. II., p. 529, 2 Scott, N. R. 689, and *Schack v. Anthony*, 1 M. & S. 573, are both authorities for the defendants. In the last-mentioned case Lord ELLENBOROUGH, C. J., says, “If a bond were given to a trustee, it could hardly be contended that an action of assumpsit might be maintained by the *cestui que trust* for the recovery of the money secured by *the bond.” That is almost precisely this case; *593] for if assumpsit will not lie, neither will debt on simple contract. *Foster v. Allanson*, 2 T. R. 479, will perhaps be relied upon by the other side; but it is distinguishable. In that case there was a deed between partners, containing covenants to account yearly, and to come to a settlement at the expiration of the partnership. The partnership was dissolved before the period contemplated; the partners met together and came to a settlement of account, and the defendant promised to pay the plaintiff the amount that was found to be due. And it was held that assumpsit would lie for

the balance that had been so ascertained, the deed being considered as mere matter of inducement to the debt. [CRESSWELL, J. That principle was recognised in the recent case of *Roper v. Holland*, 3 A. & E. 99, 4 N. & M. 668, where the point is put in one sentence by Lord DENMAN, C. J. —“If this was an open account, it was a trust account.” *White v. Parkin*, 12 East, 578, is the converse of *Foster v. Allanson*, but it was decided upon the same principle. In that case there was a parol contract, which was anterior to a covenant under seal, and was distinct from that covenant, and not inconsistent with it, and it was held that such a contract might be enforced in assumpsit.

Besides, an action for money had and received implies that there was a sum certain in the hands of the defendants, and the plaintiff must give evidence of the particular sum to which he is entitled; *Harvey v. Archbold*, 3 B. & C. 626, 5 D. & R. 500.

At any rate there is no money in the defendants' hands which is ascertained to belong to the plaintiff. A party cannot call upon trustees, to account, in an action for money had and received. The money never was received to the plaintiff's use; it was received for the *purposes of the trusts in the deed. In *Case v. Roberts*, Holt, N. P. C. 500, [*594 BURROUGH, J., clearly lays down the rule—“If money is paid into the hands of a trustee for a specific purpose, it cannot be recovered in an action for money had and received, until that specific purpose is shown to be at an end. The action for money had and received must not be turned into a bill in equity for the purpose of discovery. If the plaintiff show that the specific purpose has been satisfied, that it has absorbed a certain sum only, and left a balance, such balance (the trust being closed) becomes a clear and liquidated sum, for which an action will lie at law. Whilst the matter remains in account, and is charged with the specific trust, the action for money had and received will not lie.” *English v. Blundell*, 8 Carr. & P. 332, is to the same effect.

Atcherley, Serjt., (with whom was *Peacock*,) in support of the rule. The defendants took an assignment of a mere *chose in action*—not of any legal interest—whereby they are authorized to receive 500*l.*, and it appears they have received more than 700*l.* The right to the money therefore still remains in the plaintiff. [COLTMAN, J. The 500*l.* is the sum which the banking company are to receive: it does not include the costs. CRESSWELL, J. The defendants are to receive the moiety of the debt from Allie's estate, whatever it may produce.] The deed, it is submitted, operates merely as a power of attorney to receive the money for the plaintiff. It contains, in fact, no covenant on the part of the defendants, but merely a proviso. [TINDAL, C. J. Is it not, in effect, an agreement under seal? No particular form of words is necessary to make a covenant; as is laid down in Com. Dig. tit. *Covenant*, (A. 2,)(c)] Even assuming it to be a covenant, still

*595] debt for money had and received is *maintainable under the circumstances; or, at any rate, the objection that it is not so is not available to the defendants under the plea of never indebted. In *Atty v. Parish*, the deed, as was observed by Sir J. MANSFIELD, C. J., contained several conflicting provisions, and various conditions precedent; there are none such here. And that case has always been doubted as an authority. In *Burnett v. Lynch*, A., a lessee, assigned by deed-poll his interest to B., subject to the performance of the covenants contained in the indenture of lease. B. took possession and occupied the demised premises under this assignment, and before the expiration of the term assigned to C. The lessor sued A., the lessee, for breaches of covenant committed during the time that B. continued assignee of the premises, and recovered damages against A.; and it was held that A. might maintain an action upon the case in *tort* against B. for having neglected to perform the covenants during the time he continued assignee, whereby A. sustained damage. HOLROYD, J., there said, "The assignee, standing in the situation of the original lessee, is liable by the common law to all the duties which were cast upon the lessee by means of his covenants in the lease. And, if that be so, the consequence seems to follow, that an action on the case will lie against the assignee when he neglects to discharge those duties. I think that is the proper remedy. I have considerable doubt whether covenant would lie; but even if it would, that would not take away from the plaintiffs the right to maintain an action upon the case." 5 B. & C. 607. [TINDAL, C. J. Nothing is said there as to an action upon simple contract being maintainable.] *Atty v. Parish* does not appear to have been brought before the court in that case; but it was in *Tilson v. The Warwick Gas Light Company*. *That was an action of debt against a corporation, brought by an attorney for his costs, and it was held, upon general demurrer, that, even assuming that a corporation could not contract otherwise than by deed, the omission to set out a deed was a mere matter of form, and therefore ground of special demurrer only. In that case BAYLEY, J., says, "I cannot subscribe to the law laid down in *Atty v. Parish*. I do not admit that where the contract is such that the plaintiff may recover upon it, whether it is by deed, or not, the deed, if there is one, must be declared upon; on the contrary, the strong inclination of my opinion, upon principle, is, that though there is a deed, still, if there is a debt independent of the deed, except that the amount of it is to be ascertained by the deed, the existence of the deed does not prevent the plaintiff from recovering the debt upon the common counts." (a) [CRESSWELL, J. That doctrine would be applicable here, if the defendants had received money to your use, and the deed had been afterwards executed. You might then perhaps have sued upon the implied contract.] Here the cause of action is, that money has been received for the plaintiff, but not under any covenant. The action is

(a) 7 D. & R. 381. Vide post, per Cresswell, J., p. 600.

not brought against the defendants for not accounting; but for money which they have received, in which they have not, and in which the plaintiff has, a legal interest.

But even if the action should, strictly speaking, have been brought upon the deed, the defence is not admissible on these pleadings. In point of law and substance the money was received to the plaintiff's use; the covenant, therefore, under which the defendants claimed a right to deal with it, should have been pleaded. *Filmer v. Burnby* is an authority for the plaintiff upon this point. BOSANQUET, J., there said, "The material question *in this case is, whether there was an agreement by simple contract [*597 between these parties, or whether the demand sought to be enforced in this action arose out of a contract by specialty. At the trial, the learned judge was of opinion, upon the evidence, that no promise by simple contract had been established; and he accordingly directed a verdict to be entered for the defendant upon the first issue. It has been contended that this direction was erroneous. First, it is said, that there was a complete agreement by parol antecedently to the execution of the deed; and no doubt, if such an agreement had once existed, the means by which it had been put an end to would, under the new rules, be properly the subject of a special plea." That certainly was a case of a consummated parol liability existing antecedently to the execution of a deed. This is the converse. Here, no action would lie till the money was received; and as soon as it was received, that fact gave the right of action to the plaintiff.

The only remaining question is, whether the action lies before an account has been stated, or a settlement had, between the parties. But this is not the ordinary case where trustees take a *legal* interest; the defendants here take a mere *equitable* interest. Where land or goods are conveyed to trustees it may be that something must be done before the *cestui que trust* can sue them at law; but this, being the assignment of a *chose in action*, is a very different case.

TINDAL, C. J. This is an action of debt for money had and received by the defendants to the use of the plaintiff. The ground and principle upon which this form of action is maintainable is, that the defendant has received money which, *ex æquo et bono*, belongs to the plaintiff. The action was brought into general use in *the time of Lord MANSFIELD; and it has always [*598 rested upon that ground. I am not aware that the action has ever been allowed, except in cases where a known specific sum has been received by the defendant, to which the plaintiff is entitled; as where such money has been received without consideration, or where it has been received justly in the first instance, and the consideration has failed afterwards; in such cases, the defendant holds the money, in justice and equity, to the use of the plaintiff. But, in this case, after the money had come into the hands of the defendants, something remained to be done under the contract before any portion of it was to go over to the plaintiff. The defendants were to receive the proceeds of the suit, upon three specific

trusts --first, to pay all costs, charges, and expenses; secondly, to pay to the banking company any debt due to them from the plaintiff, not exceeding the sum of 500*l.*; and, thirdly, to pay the surplus, if any, over to the plaintiff. The only right of the plaintiff to recover any thing is, therefore, under the provisions of the third trust. But this action is brought before it appears that any thing has been done under the trust—before it has been ascertained what sum is due and payable from the plaintiff to the banking company. The plaintiff, indeed, says that the defendants have received more than the banking company can possibly be entitled to, the amount to be paid to them being limited to 500*l.* But what sum is payable to them, and what is the amount of the costs and charges to be paid out of the money, are facts which are left undetermined. It may be that the amount of such costs and charges will completely absorb the surplus beyond the amount to which the banking company are entitled. The whole is left in complete uncertainty. The plaintiff ought to have filed a bill in equity for *599] an account. If the present action was held to be maintainable, *I will venture to say it would be the first instance of the kind. Indeed the case of *Roper v. Holland*, 3 A. & E. 99, 4 N. & M. 668, is an answer to the present action; as is also what is said in *Case v. Roberts*, Holt, N. P. C. 500, by BURROUGH, J., who states the principle concisely, correctly, and intelligibly. Looking at all the facts of the present case, it appears to me to come within that class,—of which class are *Weston v. Downes*, 1 Dougl. 23, and *Power v. Wells*, Cowp. 818,—where money has been paid upon a special contract, and it has been held that, unless that contract be rescinded, the party has no right to bring money had and received. The money in this case was received under a special contract, which still remains open. I think, therefore, the rule to set aside the nonsuit must be discharged.

COLTMAN, J. I think the doctrine laid down in *Case v. Roberts* puts an end to this case. All the costs were to be paid out of the money to be received by the defendants before the plaintiff would have any right to the surplus. If a definite sum of money had been fixed to be paid as costs, and then the surplus was to be paid over, there might have been no difficulty; but the present case is very different.

CRESSWELL, J. I also think that the nonsuit in this case was quite right. Two objections were taken at the trial—first, that the action should have been brought on the deed, and not in debt upon simple contract; and, secondly, that as the trusts under which the money was received by the defendants were not closed, the action for money had and received did not lie.

It is not necessary to determine the first point in this case. At the same *600] time I may say, that *Atty v. Parish*, 1 N. R. 104, seems to be a strong authority in support of it. It has been said that that case is overruled by *Tilson v. The Warwick Gas Light Company*, 4 B. & C. 962, 7 D. & R. 376; but I do not think so. The point was not necessary to

the decision of that case; and there is a considerable difference in the two reporters as to the language that fell from BAYLEY, J., (his lordship read the passage from 7 D. & R. 381, as set out, *antè* p. 596.) In 4 B. & C., page 968, the language of the learned judge is much more limited as to the effect of *Atty v. Parish*. He is there reported to have said, "I am not convinced by the case of *Atty v. Parish*, that where a contract appears upon the face of a declaration to be such that the plaintiff may recover, whether the contract be by deed or not, that it is necessary to declare upon the deed if there be one." All therefore that the learned judge says is, be it that *Atty v. Parish* is good law, still it does not convince me that under a given state of circumstances it is necessary to declare on the deed. He then goes on to say, "The strong impression upon my mind is that, upon principle, although there be a deed between the parties, yet if there be a debt independent of the deed, the existence of the deed will not prevent the party from recovering that debt upon the common counts." That may be so, and *Atty v. Parish* may be very good law notwithstanding. It may be observed too, that HOLROYD, J., does not say any thing with respect to that case. I think it may well be said that, if money is received by a party, under circumstances which would raise an implied promise to pay it over to another, or received under an express promise so to pay it over, and subsequently a deed is entered into between these parties in order to ascertain the amount to be *paid over, an action as simple contract can be [601 sustained. But what contract is there here independent of the deed? The money is to be taken, and dealt with, by the defendants, under the deed. There is an express contract in that deed, and no other contract can be implied.

As to the point on the pleadings, it is said that the defence insisted upon is not admissible under the plea of never indebted. But the case of *Filmer v. Burnby*, *antè*, Vol. II., p. 529, 2 Scott, N. R. 689, seems to me to be precisely in point upon that question. The present case falls within the rule there laid down by the judges. If there has been an original independent simple contract which is merged in a deed, it may be necessary to plead the deed: but here, the only contract between the parties is by deed, there never having been any simple contract between them. It appears to me therefore that the deed was admissible in evidence under the plea of *never indebted*.

As to the other point, I think the opinion of BURROUGH, J., in *Case v. Roberts*, is decisive. This is, palpably, an open trust; under which several things remained to be done by the defendants. Suppose the plaintiff had brought his action upon the covenant, he must have sued for the surplus, after showing that the trust had been performed. He was not in a situation to show that fact in this case; and perhaps that may be the reason why the present form of action was adopted.

Upon the whole, I am clearly of opinion that the nonsuit ought to stand
Rule discharged.

*602]

*DOE dem. POPE v. ROE. May 30.

In an ejectment for seven houses adjoining each other, and held under one lease, the tenants of four having been duly served, the court granted a "serviceable rule absolute" as to the other three, which were empty, upon an affidavit stating that the tenant had left them and embarked with his family for America, that the lessee was dead, intestate, and insolvent, and that copies of the declaration and notice had been affixed on the outer doors of the three houses, and a copy served on one D., the attorney for one Jones, who had been in the habit of receiving the rents.

EJECTMENT, for seven houses situate in Great John street, in the parish of St. John, Southwark, adjoining each other, and held under one lease.

Channell, Serjt., moved for judgment against the casual ejector. As to four of the houses, the tenants had been duly served; as to the three remaining houses, numbered 16, 17 and 18, the affidavit stated that they were, and had been for some time past, unoccupied, and, in consequence thereof, and there being no person in or about the said three several last-mentioned houses, or any of them, the deponent was unable to serve a copy of the declaration and notice at any of the three houses, but that he affixed a copy upon the outer door of each of those houses; that all the houses mentioned in the declaration, and for which this ejectment was brought, were adjoining each other, and were comprised in one lease thereof granted to one John Whayman, deceased, and which lease was not expired; that the deponent had been informed and believed that Whayman died some time since intestate and insolvent, and he had not been able to discover who was Whayman's personal representative, nor did he know where the supposed owner or landlord of the three last-mentioned houses could be found, other than at the premises mentioned in the declaration, where the deponent was informed, by the tenants of the said other houses, that one Jones had been in the habit of attending to receive the rents of the said premises; but, the deponent having been informed that Mr. George Drew was

*603] the attorney and solicitor of *the person named Jones, who received the said rents of the said premises as aforesaid, he, the deponent, personally served Drew with the declaration and notice, by delivering a copy thereof to Drew, who admitted to the deponent that he was the attorney for Jones. The learned serjeant submitted that enough had been done to entitle him at least to a rule nisi; and he cited *Doe dem. Osbaldiston v. Roe*, 1 Dowl. P. C. 456, where, the affidavit stating that inquiry had been made for Cook, one of the tenants, on the premises, that it was found that he and his family had left the premises, and were understood to have embarked for America, and not to intend to return, and that the declaration and notice had been affixed on the door of Cook's house, and had also been delivered, and read over and explained, to a person on the premises, who was servant to one of the tenants of other part of the premises, the court granted a rule nisi, directing that it should be served in the same manner as the declaration had been served.

TINDAL, C. J. The two cases seem very much alike. Take a rule nisi

The rest of the court concurring, the rule was drawn up as follows:

Rule absolute, unless cause shown to the contrary on Tuesday next—service of the rule, by affixing a copy on the respective outer doors of the houses numbered 16, 17 and 18, in Great John street, in the parish of St. John, Southwark, being part of the premises in question, and by leaving another copy at the office of Mr. George Drew, in the said affidavit named, to be deemed good service.

•POTT and Others, Assignees of WEATHERBY and Others, [*604
Bankrupts, v. BEAVAN. June 3.

Where a party is indebted to a trader in a sum bearing interest, the assignees may recover interest accruing subsequently to the bankruptcy, although there be no express reservation of interest.

ASSUMPSIT, for money lent and paid by the bankrupts, money had and received to their use, interest and money due to them upon an account stated, with a count for interest accruing after the bankruptcy.

Plea, non assumpsit.

At the trial before ROLFE, B., at the last Liverpool spring assizes, it appeared that the defendant was indebted to the bankrupts, who were bankers, in 351*l.* for advances made to one Williams, his agent. A verdict was taken for the plaintiffs, damages 392*l.* 18*s.* 6*d.*, with leave to the defendant to move to reduce the amount by striking out 41*l.* 18*s.* 6*d.*, a sum allowed by the jury for interest since the stoppage of the bank.

MURPHY, Serjt., having in Easter term last obtained a rule accordingly, and also for a new trial, on the ground that the verdict was against the evidence,

TALFOURD, Serjt., (with whom was Tomlinson,) now showed cause. The question is, whether the bankruptcy put an end to the defendant's liability to pay interest. In *Moore v. Voughton*, 1 Stark. N. P. 487, the assignees were held entitled to recover interest. [TINDAL, C. J. Was there not some party to whom the defendant might have paid the debt notwithstanding the bankruptcy?] An official assignee was appointed immediately; and, consequently, the bankruptcy imposed no difficulty upon the defendant. The principle on which interest is allowed* to be recovered is clearly established by the cases of *De Haviland v. Bowerbank*, 1 Campb. 50; [*605 *De Bernales v. Fuller*, 2 Campb. 426; *Bruce v. Hunter*, 3 Campb. 467; *Newal v. Jones*, Mood. & Malk. 449; *Calton v. Bragg*, 15 East, 223; and *Higgins v. Sargent*, 2 B. & C. 348, 3 D. & R. 613; and the bankruptcy can have no effect in varying the contract between the parties.

MURPHY, Serjt., in support of his rule. Though the defendant may have been liable to pay interest to the bankers, such liability ceased upon their becoming bankrupt. In *Cameron v. Smith*, 2 B. & Ald. 305, it was held that interest accruing before the act of bankruptcy, cannot be added to the

principal sum due on a bill of exchange, so as to constitute a good petitioning creditor's debt, unless interest be payable on the face of the bill. Suppose here that the parties were reversed, and the bankers indebted to the defendant at the time of their stopping payment; would he have been entitled to claim interest from their assignees?

TINDAL, C. J. In this case, if the banking-house had not stopped payment, the liability of the defendant to pay interest would have continued: and I do not see upon what principle, after the statute of the 6 G. 4, c. 16, s. 63, has vested in the assignees all the rights of the bankrupts in such ample and distinct terms as these—namely, that “the commissioners shall assign to the assignees, for the benefit of the creditors of the bankrupt, all the present and future personal estate of such bankrupt, wheresoever the same may be found or known, and all property which he may purchase, or *606] which may revert, descend, be devised or bequeathed, *or come to him before he shall have obtained his certificate; and the commissioners shall also assign as aforesaid all debts due or to be due to the bankrupt, wheresoever the same may be found or known, and such assignment shall vest the property, right, and interest in such debts in such assignees, as fully as if the assurance whereby they are secured had been made to such assignees,” &c.: we can hold the interest of the assignees to be less extensive than that of the bankers before the bankruptcy. It seems to me that as the bankers were entitled to interest at the time of their bankruptcy, so the assignees are entitled to the interest which has subsequently accrued.

COLTMAN, J. I am of the same opinion. Notwithstanding the bankruptcy, it was the duty of the defendant, as well as his interest, to discharge the debt owing by him to the bank. This is a very different case from that put of a debt due *from* the estate of the bankrupts. A creditor is bound to come forward and prove his debt. But assignees are not bound to hunt out all the debtors.

MAULE, J., and CRESSWELL, J., were absent.

Rule discharged.

*607] *GORDON, REID, and PHIPPS, v. ELLIS and Another.

June 11.

In *assumpsit* by A., B. and C. against D., upon a money demand, D. pleaded that the plaintiffs carried on business in partnership; that the plaintiff A., with the privity and concurrence of the plaintiffs B. and C., requested A. to sell certain property belonging to D., B. and C. as copartners, which D. thereupon agreed to do; that, at the time A. requested D. to sell, and also at the time of the sale, and of the making the loans and advances by D. to A. therein-after mentioned, D. believed A. to be the sole owner of the property, and that he had full authority to dispose of it for his sole use and benefit, D. having no knowledge that B. and C. had any interest in it; that, after D. had been so retained and employed to sell the property, and before it was sold, and before he had any notice or knowledge that A. was not solely possessed of and interested in the property, D., at the request of A., lent divers sums of money to A.; that, before D. lent the said money to A., it was agreed between them that D. should retain, deduct, and reimburse himself the full amount out of the proceeds of the property;

that D. was induced to lend and did lend the said money to A. upon the faith and in consideration of such agreement; and that D. did sell and dispose of the said property for A., *the other plaintiffs suffering and permitting A. to deal therewith as his own sole property, without objection or interference*; and the plea then justified retaining the money to reimburse D. for such advances under the said agreement.

To this plea the plaintiffs replied that B. and C. *did not suffer or permit A. to deal with the said property as his own sole property.*

A verdict having been found for the plaintiffs:—*Held*, on motion to arrest the judgment, that enough of the plea remained unanswered to constitute a sufficient bar to the plaintiff's right to recover; that the replication traversed an immaterial allegation; but that the proper course was, not to arrest the judgment, but to award a repleader.

The rule that a repleader is never awarded in favour of the party who made the first fault, applies only where the issue is found against that party.

ASSUMPSIT for money had and received and upon an account stated.

Pleas—first, except as to 160*l.*, non assumpsit—secondly, except as aforesaid, a set-off—thirdly, except as aforesaid, that, before the money in the declaration mentioned had been had or received by the defendants, and also before the stating of the account in the declaration mentioned, or either of them, to wit, on the 1st of July, 1842, the plaintiffs carried on the trade and *business of founders in partnership together; and thereupon, while the plaintiffs continued to be and were such partners, to wit, on, &c., aforesaid, the plaintiff Gordon, with the privity and concurrence of the other plaintiffs, requested the defendants, who then carried on, and still carry on, in partnership together, the trade and business of auctioneers and appraisers, and also then retained and employed them the defendants as such auctioneers to put up to sale and dispose of certain property of and belonging to the plaintiffs as such copartners as aforesaid, which the defendants then consented and agreed to do: that, at the time when Gordon so requested them to sell and dispose of the said property, and also at the time of their selling and disposing thereof, and at the times when the debts and moneys thereafter mentioned to have been due from Gordon to the defendants became and were due and were incurred, as thereafter mentioned, the defendants believed that Gordon was the sole and exclusive owner of the said property, and had full power and lawful and absolute authority to sell and dispose of the same, and to receive the proceeds thereof as and for his own property, and for his own sole use, benefit, and advantage, the defendants then having no notice or knowledge whatsoever that the other plaintiffs, or any other person, had any right, title, estate, or interest whatever in the said property, or any part thereof: that the defendants afterwards, to wit, on, &c., aforesaid, sold and disposed of the said property for certain sums of money, being the same identical moneys in the declaration above-mentioned and for which the action was brought: that, after Gordon had so retained and employed the defendants as aforesaid, and before the defendants or either of them had any notice that Gordon was not the sole and exclusive owner of the said property or of the proceeds thereof, and before and at the commencement of the *action, to wit, on, &c., aforesaid, Gordon became and was, and ever since had been and still was, indebted to the defendants in a large sum of money, to wit

5000*l.*, for work and labour of the defendants, by them before then done and performed for Gordon at his request, and for money lent by the defendants to Gordon at his like request, and for money paid by the defendants for the use of Gordon at his like request, and for money found to be due to the defendants from Gordon upon an account then stated between them; which sum of money so due to the defendants from Gordon as aforesaid exceeded the moneys in the declaration mentioned, except as aforesaid, and out of which sum the defendants were ready and willing and thereby offered the full amount of the moneys in the declaration mentioned, except as aforesaid. Verification.

Fourthly—as to so much of the causes of action as related to the moneys in the declaration mentioned, except as aforesaid,—payment.

Fifthly—as to so much of the causes of action as related to the sum of 352*l.* 1*s.* 8*d.*, parcel of the moneys in the declaration mentioned—that, before the said moneys had been had or received by the defendants, and also before the stating of the accounts in the declaration mentioned, or either of them, to wit, on the 1st of July, 1842, the plaintiffs carried on the trade and business of founders in partnership together; and thereupon, while they the plaintiffs continued to be and were such partners as aforesaid, to wit, on, &c. aforesaid, Gordon, with the privity and concurrence of the other plaintiffs, requested the defendants, (they then and still being and carrying on in partnership together the trade or business of auctioneers and appraisers,) and also then retained and employed them the defendants to put up to sale and dispose of certain property of and belonging to the said *610] firm and to the plaintiffs as such *copartners as aforesaid; which they the defendants then consented and agreed to do: that at the time when Gordon so requested them to sell and dispose of the said property, and also at the time of their selling and disposing thereof, and of their making the loans and advances to Gordon thereafter mentioned, the defendants believed that Gordon was the sole and exclusive owner of the said property, and had full power and lawful and absolute authority to sell and dispose of the same, as his own property, and for his own sole use, benefit, and advantage, the defendants then having no knowledge or notice whatsoever that the other plaintiffs or any other person had any right, title, estate, or interest whatsoever in the said property: that, after they had been so applied to and requested and retained and employed by Gordon to sell and dispose of the said property as aforesaid, and before the same had been sold or disposed of, and before they had any notice or knowledge whatsoever that Gordon was not solely and exclusively possessed of and interested in the said property, to wit, on the 1st of January, 1842, and on divers other days and times between that day and the commencement of the suit, the defendants, at the request of Gordon, lent and advanced to him divers sums of money, in the whole amounting to the sum of money in the introductory part of that plea mentioned; that, before the defendants lent or advanced the last-mentioned moneys or any part thereof to Gordon, to wit, on, &c.

last aforesaid, it was agreed between him and them that the defendants should and might retain, deduct, and reimburse themselves the full amount of the said moneys out of the proceeds of the said property so to be sold and disposed of as aforesaid; that the defendants were induced to advance and lend the said moneys, and did advance and lend the same, to Gordon, upon the faith and confidence and in consideration of the *last-mentioned agreement, and not otherwise; that afterwards, and before the com- [*611
 mencement of the suit, to wit, on, &c., aforesaid, the defendants did sell and dispose of the said property for Gordon, *the other plaintiffs at the several times aforesaid suffering and permitting Gordon to deal therewith as his own sole property without objection or interference*, and afterwards, and before the commencement of the suit, to wit, on, &c., last aforesaid, received the money for which the same was so sold as aforesaid: that the said money in the declaration mentioned to be due from them to the plaintiffs was the same identical money which the defendants received as the price, purchase money, and proceeds of the said property, and not other or different; wherefore they the defendants did, in pursuance of the said agreement, and before the commencement of the suit, retain the said sum of money in the introductory part of that plea mentioned, for the purpose of reimbursing themselves the moneys so advanced and lent by them to Gordon as aforesaid. Verification.

Sixthly—as to so much of the causes of action as related to the sum of 350*l.*, other parcel of the moneys in the declaration mentioned than the sum in the introductory part of the fifth plea—a similar plea to the last.

Seventhly—as to the residue of the declaration—payment of 160*l.* into court.

On the first plea, the plaintiffs joined issue. To the second, they replied that they were not indebted, *modo et formâ*. To the third, that at the time of the selling and disposing of the property in the said third plea mentioned as therein alleged, the defendants had knowledge that Gordon was not the sole and exclusive owner of the said property,—concluding to the country. To the fourth, a traverse of the alleged payment. To the fifth, that Reid and Phipps did not suffer or permit *Gordon to deal with the property in the fifth plea mentioned as his own sole [*612
 property, *modo et formâ*. To the sixth, that Reid and Phipps did not suffer or permit Gordon to deal with the said property as his sole property, *without objection or interference, (a) modo et formâ*. Upon the last plea they took the money out of court.

At the trial before COLTMAN, J., at the sittings at Westminster after last Hilary term, a verdict was found for the plaintiffs, damages 835*l.* 18*s.* 4*d.*, beyond the 160*l.* paid into court.

Sir T. Wilde, Serjt., in Easter term last, obtained a rule nisi to arrest the judgment as to so much of the demand as was included in the introductory

(a) *Quære*, whether the words in italics do not raise a negative pregnant.

part of the fifth and sixth pleas, (a) on the ground that the replications to those pleas took issue upon an immaterial allegation, and left unanswered sufficient matter to constitute a good bar to so much of the cause of action as those pleas respectively professed to answer. He cited *Wallace v. Kelsall*, 7 M. & W. 264, 8 Dowl. P. C. 841; *Jones v. Yates*, 9 B. & C. 532, 4 Mann. & R. 613; *Sparrow v. Chisman*, 9 B. & C. 241, 4 Mann. & R. 206; *Jacaud v. French*, 12 East, 317; *Richmond v. Heapy*, 1 Stark. N. P. C. 202.

Channell, Serjt., (with whom was *Bovill*), on a former day in this term, showed cause.—The fifth and sixth pleas, although addressed to different sums, are substantially the same. It is submitted that the allegation that *613] *is traversed in the replication,—viz., that Reid and Phipps suffered and permitted Gordon to deal with the property in the plea mentioned, as his own sole property, was essential to make the plea good. The sum mentioned in the introductory part of the plea is stated to be an advance to Gordon, and not to the partnership, upon an agreement that the defendants might reimburse themselves out of the proceeds of the sale of the goods. The agreement by Gordon did not bind his partners, inasmuch as the plea discloses no express authority from them, and the implied authority belonging to him as a partner, would not suffice to make the agreement good. The plea therefore proceeds to state other circumstances to supply the want of such authority—that Gordon, with the privity and concurrence of the other plaintiffs, retained and employed the defendants to sell certain property belonging to the firm; that, at the time when Gordon so applied to the defendants to sell, and at the time of the sale, and of the defendants making the advances to Gordon, they believed him to be the sole owner of the property, and that he had full authority to dispose of it as his own, the defendants having no notice, and not knowing, that other plaintiffs had any interest in it: and the plea then alleges the fact that is traversed, that the other plaintiffs permitted Gordon to deal with the property as his own. The object of the plea is, to make out an identity between Gordon and the firm of which he is a member, in order to let in a set-off: and in this view it was essential that the plea should contain the allegation in question, showing that Reid and Phipps had made Gordon their agent in the matter. The plea seems to have been framed chiefly with a view to the *614] decision in *George v. Claggett*, 7 T. R. 359, recognised in *Baring v. Corrie*, 2 B. & Ald. 137, where it was held, that, if a factor, who sells under a *del credere* commission, sells goods as his own, and the buyer knows nothing of any principal, the buyer may set-off any demand he may have on the factor, against the demand for the goods made by the principal. So, in *Carr v. Hinchliff*, 4 B. & C. 547, 7 D. & R. 42, a plea, in assumption for goods sold and delivered,—that the goods were sold and delivered to the defendants by A., the factor and agent of the plaintiff, with the pri-

(a) *Quare*, whether, if the judgment had been arrested, it must not have been arrested in the entire damages being assessed. It is true that specific sums are mentioned in the introductory parts of the fifth and sixth pleas, but *non constat* that the damages sustained by reason of the non-payment of 352*l.* 1*s.* 8*d.* and 350*l.*, corresponded in amount with those sums.

vity of the plaintiff, as and for the goods of A., and that the defendant did not know that the goods were not the property of A. ; that, at the time of the sale and delivery, A. was, and still is, indebted to the defendant in more than the value of the goods, and that the defendant was ready and willing to set-off and allow to the plaintiff the value of the goods out of the moneys so due and owing from A.,—was held good, on general demurrer, upon the ground that the permission given by the principal to the factor to sell the goods in the manner he did, created an identity between them, so as to entitle the defendant to set-off the debt due to him from the factor. It will be contended for the defendants, that, as Gordon could not have sued alone in this case, he cannot recover by joining his partners in the action; and cases were cited when this rule was obtained for the purpose of establishing this proposition,—that, although one partner, where he is made a defendant, may say he is not bound by the contract of his co-partner, on the ground that it was a fraud on him, yet, if he comes into court as a plaintiff, his situation is altered; that, in every case where he appears as a plaintiff, he is bound by the acts of his partner although done without authority. There is, however, no such rule; and if there were, it would lead to most *alarming consequences. No such proposition can be collected from [*615 the cases that, because there is a defence as against one partner, there is a defence as against the others also. The utmost that can be deduced from the cases is, that where a firm are plaintiffs, and have no claim except as arising out of the act of one of the members, they cannot rely upon it as giving them a cause of action, and at the same time say it is a fraud upon the partnership. *Jones v. Yates*, 9 B. & C. 532, 4 M. & R. 613, does not warrant the inference that is sought to be drawn from it. All that Lord TENTERDEN says, in delivering the judgment of the court, is, that “the party to a fraud—he who profits by it—shall not be allowed to create an obligation in another by his own misconduct, and make that misconduct the foundation of an action of law.” Here the plea does not allege fraud on the part of Gordon: it is nowhere stated that Gordon represented himself to be the sole owner of the goods. And even if the court should think there was fraud on the part of Gordon, the cases are not at all analogous. Here the rights of the plaintiffs are independent of any act of Gordon; and they are entitled to recover against the defendants the amount of their goods sold by the latter; whereas in *Jones v. Yates* the plaintiffs had no case except through the bill which had been improperly endorsed over by one of them. Here the defendants are seeking to set-off an advance to one of the firm. It would be strange if they could not set it off, and yet could retain the amount under this plea. *Sparrow v. Chisman*, 9 B. & C. 241, 4 Mann. & R. 206, is also inapplicable to this case: there, one of several partners in a banking-house drew a bill in his own name on a third party, who accepted the same upon condition that the drawer should provide for the same when due: and it was held that all the partners in the banking *firm [*616 could not recover on the bill. Here the plea seeks to make out the

identity of Gordon with Reid and Phipps, by showing such laches or neglect on their part as makes them liable to pay the debt of Gordon, and an absence of fraud on the part of the defendants. It is apprehended that the plaintiffs could not have demurred on the ground of duplicity; Stephen on Pleading, 5th edit. 290: and that they could not have replied *de injuriâ*; *Purchell v. Salter*, 1 Q. B. 197, 1 Gale & D. 682, 9 Dowl. P. C. 517. [CRESSWELL, J. The case put by Stephen is one where the matter which is supposed to make the plea double, is necessary to be stated. So, here, if this were a plea of set-off, it might be essential to show that Gordon was permitted to deal with the property as his own sole property. But is this a plea of set-off? In *Wallace v. Kelsall*, 7 M. & W. 264, to an action by three plaintiffs for a joint demand, the defendant pleaded an accord and satisfaction with one of the plaintiffs, by a part payment in cash and a set-off of a debt due from that one to the defendant: and it was held that the plea was good, without alleging any authority from the other two plaintiffs to make the settlement.] That case is not applicable; for this is not a plea of accord and satisfaction.

At any rate the defendants cannot call upon the court to arrest the judgment, inasmuch as it is admitted that the plaintiffs are entitled to retain their verdict on the third issue. All that the court could do in this case would be to award a repleader; but this is never granted to the party who is guilty of the first fault in pleading. Com. Dig. tit. *Pleader* (R. 18;) *Plomer v. Ross*, 5 Taunt. 386, 1 Marsh. 95; *Wordsworth v. Brown*, 3 Dowl. P. C. 698.

Sir T. Wilde, and Byles, Serjts., (with whom was J. W. Smith,) in support of the rule. This is not a plea of *set-off, as the other side has
 *617] sought to treat it. The question does not turn on Gordon's authority to bind his partners by his acts apart from fraud, but upon his right, jointly with them, to recover money which he has already received by way of anticipation. The substance of the plea is, that Gordon employed the defendants to sell the goods, and, before such sale, agreed, that, if they would advance him money on the security of the goods, they should be at liberty to retain it out of the proceeds. The materiality of the plea depends upon the same principle as if Gordon had been suing as the sole plaintiff. Where a partner obtains money under such an agreement, and no fraud is suggested, and no evidence is given as to the disposal of the money, can he, by joining his partners in the action, defeat his own agreement, and recover that which he has already received? There are two material facts in the plea, a traverse of either of which would have negatived the plea, if found for the plaintiffs, namely, that Gordon agreed that the money advanced to him should be retained out of the proceeds of the sale, and that such advance was made upon the faith of that agreement. The principle that a plaintiff cannot recover in breach of his own agreement and against good faith, is clearly supported by the authorities: and the distinction suggested, by which it is sought to limit the rule to the case where the right of co-

plaintiffs to recover depends on the fraudulent act of one of them, is totally without foundation. Here, the plaintiffs are suing in respect of a contract under which Gordon received the money, and are seeking to defeat the very agreement under which the goods were sold. *Wallace v. Kelsall* is completely in point. Lord ABINGER there said: "I am of opinion that this plea is good: and that, as it is competent for one of these joint-plaintiffs to release a joint debt, it is competent for one of these joint-plaintiffs to settle the action, so as to protect *himself from being obliged to sue. The [*618 case that might be suggested has been properly put in argument.

Suppose, after this accord and satisfaction, two of the plaintiffs were to die, and the only person surviving were the person who gave the accord and satisfaction, it is quite plain in that case that he could not have sued for this debt. If it is not illegal, the accord and satisfaction operates as a release by him; and, if it is a release by him, that is sufficient. This is an accord and satisfaction by one, and no fraud is suggested, nor can it be presumed: we have just as much right to presume that the other parties authorized him to settle the action, as that the settlement was fraudulent."

And PARKE, B., said: "In the case referred to, of *Jones v. Yates*, the principle of the decision is, that if one of the plaintiffs is barred, he cannot recover by joining other plaintiffs in an action to undo his own act. In this case, no doubt, the plaintiff Wallace, who has made this agreement, is barred by his own agreement to set-off one debt against the other; and he cannot undo the transaction by joining the other two plaintiffs with him for that purpose. I am of opinion, therefore, that this is a good plea, supposing there was no fraud; and there is no imputation of any. We cannot assume that there was any fraud, unless it be alleged in the pleadings; and, when the question arises whether the fact of fraud would make any difference, I apprehend the same answer may be given as was used in the case of *Jones v. Yates*, that a person cannot be allowed, as a plaintiff in a court of law, to rescind his own act by joining his co-partners with him." *Jacaud v. French* involves the same principle; as also does *Sparrow v. Chisman*, 9 B. & C. 241, 4 Mann. & R. 206. *Carr v. Hinchliff*, 4 B. & C. 547, 7 D. & R. 42, and the class of cases relating to principals and factors, stand upon an entirely different footing. This plea clearly is not double: it *was necessary to allege the several facts [*619 in order to make it a good answer to any claim by Gordon: but

even if the plea was demurrable on that ground, the plaintiffs would not be relieved from the difficulty of having taken an immaterial issue. Passing by the parts of the plea which disclose a good answer to the action, they have traversed an immaterial fact. This is not a case in which the court will grant a repleader. Where a party who has taken an immaterial issue succeeds, he may have a repleader, but where, as here, the plea contains a good answer, which is not traversed and must be taken to be admitted, the plaintiffs are not entitled to a repleader, but the defendants have a right to the benefit of the record as it stands. [TINDAL, C. J. As these pleas go

only to a part of the demand, how can we do otherwise than award a repleader? We are asked to arrest the judgment—arrest as to what? Where a perfect legal bar is confessed, there can be no repleader, although the issue be immaterial; Com. Dig. tit. *Pleader*, (R. 18.) In *Plomer v. Ross*, 5 Taunt. 386, and *Wordsworth v. Brown*, 3 Dowl. P. C. 698, the record was obviously imperfect. In *Negelin v. Mitchell*, 7 M. & W. 612, it was held, overruling the case of *Plummer v. Lee*, 2 M. & W. 495, that, where there are several pleas on the record, if one of them traverse immaterial matter in the declaration, and the defendant has pleaded other material matters which have been disposed of on proper issues, the court will not grant a repleader. According to the authorities, a repleader is never granted to the party committing the first fault. *Webster v. Bannister*, 1 Dougl. 396, *Kemp v. Crewes*, 1 Lord Raym. 167, 2 Lutw. 1577. [TINDAL, C. J. A repleader is rather the act of the court, where it sees that justice cannot be done without adopting that course.] *Cur. adv. vult.*

*620] *TINDAL, C. J., now delivered the judgment of the court. This case comes before us on a rule to show cause why judgment for the plaintiffs should not be arrested as to so much of their demand as is contained in the introductory part of the pleas fifthly and sixthly pleaded by the defendants. Those pleas contain, each of them, the same ground of defence to different parts of the plaintiffs' demand; and the decision as to one, will therefore govern the other, plea. The argument on the part of the defendants has been, that the replication puts in issue one allegation only contained in the plea, and that there is enough remaining in the plea unanswered to form a good bar as to so much of the plaintiffs' right of action as the plea professes to extend to; and that the defendants have, in consequence, the right to pray that the judgment may be arrested.

The first question, therefore, is, whether the several allegations in the plea, which are not denied by the plaintiffs' replication, do amount to a legal answer to the plaintiffs' right of action. The second question will be, admitting such unanswered allegations in the plea to be sufficient to bar the plaintiffs, what is the legal result as to the plaintiffs' right to judgment.

The plea, as it appears to us, is not framed by the defendants as (nor is it intended to be) a plea of set-off, but purports to be either a plea of payment by them of a certain part of the plaintiffs' demand to Gordon, one of the plaintiffs, or a plea setting up a right to retain a part of the money received by the defendants for the use of the plaintiffs, under a special agreement made for that purpose with Gordon. The arguments, therefore, urged by the plaintiffs' counsel, and the cases cited as to the defendants' right of *setting off* a sum lent by them to Gordon against him and his partners, we think inapplicable to the present case. But the real point in dispute, as it appears to us, is, whether the agreement *disclosed by

*621] the plea, is one which Gordon had, by law, the power of making, so as to bind his partners. Looking at the several allegations in the plea which are not traversed, and which are therefore admitted on the record to

be true, for the purpose of the present discussion, (a) it appears,—that the plaintiffs were copartners in trade,—that the plaintiff Gordon, with the privity of the other plaintiffs, retained and employed the defendants to sell certain personal property belonging to the plaintiffs as such copartners, which the defendants agreed to do,—that, at the time of Gordon's applying to the defendants to sell, and also at the time of the sale, and of their making the loans and advances, they believed Gordon to be the sole and exclusive owner of the property, and that he had full authority to dispose of it as his own, they the defendants having no knowledge that the other plaintiffs had any interest in it,—that, after they had been so retained and employed to sell the property, and before it was sold, they did, at the request of Gordon, lend and advance to him the sums of money mentioned in the plea, upon an agreement, before made between them, that the defendants might retain, deduct, and reimburse themselves the full amount of such moneys out of the proceeds of the property to be so sold,—and that the loans and advances were made on the faith and confidence of such agreement, and not otherwise; and the plea then justifies the retaining of the money by the defendants to reimburse themselves for such advances, under the said agreement.

And we think the facts stated in this plea amount to a good defence as to so much of the demand as the plea covers. If Gordon had been the sole plaintiff, he could not have maintained this action in the face of his own agreement; and, if he could not sue alone, it is *difficult to see [*622 upon what ground he can, when joined with his partners, have a right to sue. Gordon was the acting partner; and there can be no doubt, that, where he has authorized partnership property to be sold, with the assent of his copartners, he may also agree that part of the proceeds shall be paid to him by anticipation. There is no allegation in the plea of any collusion between Gordon and the defendants; no averment that the anticipation of payment was stipulated for, to serve the private purposes of Gordon; on the contrary, it is consistent with the allegations in the plea that the advances were necessary for the purposes of the partnership, and that the whole has been actually applied to those purposes. Upon the general principles, therefore, of the law of partnership, we see no reason for holding the agreement not to be binding on the firm. And the cases relied on by the defendants are strong authorities in support of the validity of the plea. In *Jones v. Yates* it was held, that, even where the endorsement of bills of exchange to the defendants by one of the plaintiffs, was a fraud upon the other plaintiff, his copartner, the two partners could not bring trover against the defendants to recover back the bills: Lord TENTERDEN, in giving the judgment of the court, saying, “they were not aware of any instance in which a person has been allowed, as plaintiff in a court of law, to rescind his own act, on the ground that such act was a fraud on another person, whether the party seeking to do this has sued in his own name only or jointly with such other person.” But, in the present case, as already

(a) Vide *anté*, 517.

observed, there is no imputation of fraud upon anybody. And the case of *Sparrow v. Chisman* is an authority to the same point. *Wallace v. Kellsall* is equally strong: an accord and satisfaction between the defendant and one of the copartners who were plaintiffs, partly by payment in cash *623] to that plaintiff, and partly by setting off *a private debt due from that plaintiff to the defendant, was held a good answer to a joint action by all the partners for a joint demand—on the principle, that, if one of the plaintiffs be barred, he cannot recover by joining other persons to rescind his own act. We therefore think that enough of the plea is left unanswered to bar the plaintiffs.

The second point for consideration is, whether, under these circumstances, the judgment should be arrested. The replication has traversed the allegation in the plea, “that Gordon was suffered and permitted by the other plaintiffs to deal with the property as his own;” upon which issue being joined, the jury have found for the plaintiffs. But this traverse is taken by the plaintiffs, as it appears to us, on an immaterial point—a point upon which, after the finding of the jury, we are unable to determine the right between the parties: for, suppose the other partners did not suffer Gordon to deal with the property as his own, he still had all the rights which a copartner has with respect to this property—one of which was, to make the agreement with the defendants set out in the plea. The finding, therefore, decides nothing between the parties. At the same time, it is to be observed, there are two material allegations in the plea, either of which, if traversed and the issue found for the plaintiffs, would be decisive of the right; for, if the agreement set out in the plea is denied, or the advance of the moneys under it, and either of such issues is found for the plaintiffs, there is no defence to the action.

In this state of the record, we are of opinion that the proper course is, not to arrest the judgment, but to give judgment “quod partes replacent,” in order to give the party who has made the first fault in pleading, the opportunity of setting it right: see the authorities collected in Bacon’s *624] *Abridgment, Pleas and Pleadings*, *(M. 1.) And the adverse party has no right to complain of this course; for he is, in some degree, instrumental to it himself, by going down to trial upon an immaterial issue. This distinction seems to be established by the late case of *Atkinson v. Davies*, 11 M. & W. 236, which was not adverted to in the course of the argument. And, as to the argument used at the bar, that a replader is never awarded in favour of that party who made the first fault, that doctrine only holds where the immaterial issue is found *against* the party who made the first fault in pleading; as is stated, *arguendo*, in the case of *Kempe v. Crewes*, 1 Lord Raym. 167; for which the authorities are there cited: (a)

(a) By Darnell, Serjt., (1 Lord Raym. 170.) who cites three cases—15 H. 7, 4, (*The Abbot of Towerhill’s* case, P. 15, H. 7, fo. 2—5, pl. 6,) where the abbot, who was plaintiff, having obtained a verdict upon an issue the materiality of which was doubted, the court said, “It is much better for you, and for your speed, to plead again, and sue a new *venire facias*.”—24 H. 6, 57, (meaning, no doubt, T. 22, H. 6, fo. 57, pl. 7.) a case in which the replication was a

yet, in the present case, it cannot apply, where the issue is found *in favour* of the plaintiffs, who took it.

We therefore think there should be an award of repleader.

Rule accordingly.(a)

departure, and the plaintiff was allowed to replead after verdict found for him,—and, lastly, *Tasker v. Sutter*, Rob. 112, (also shortly reported, Sir F. Moore, 567,) in which case, although the record had got into a state of great confusion, it does not appear that a repleader was awarded, or that the propriety of adopting that course was suggested.

Darnell, Serjt., also referred to Bro. Abr. tit. *Repleader*, pl. 23, 24, in which the above cases in 22 H. 6, and 15 H. 7, are merely abridged.

(a) And see *Cleary v. Stevens*, 8 Taunt. 413, 2 J. B. Moore, 464, antè, Vol. II. 508, n.

*LANGFORD v. WOODS. June 4.

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In case, for an injury to the plaintiff's reversion, by destroying a chimney, &c., parcel of the plaintiff's messuage, the plaintiff was allowed, after the expiration of the term following the appearance of the defendant, to add counts—for removing defendant's messuage without shoring up the plaintiff's messuage, whereby the plaintiff's chimney, which was entitled to the support of the defendant's messuage, was damaged; and for unskilfully pulling down the defendant's messuage, whereby the chimney of the plaintiff's messuage was injured. And the defendant was allowed to plead:—1st, to the first count, not guilty, by statute; 2dly, to the same, that the chimney was a private nuisance; 3dly, to the same, that it was a public nuisance; 4thly, to the second and third counts, not guilty; 5thly, to the second count, that the plaintiff's messuage was not entitled to the support of the defendant's messuage; and, 6thly, to the whole declaration, leave and license.

CASE. An appearance was entered by the defendant on the 29th of June, 1843; and on the 1st of Nov. a declaration was delivered, containing one count; which stated that a certain messuage was in the possession of one Search as tenant thereof to the plaintiff, the reversion thereof then and still belonging to the plaintiff, and that the defendant wrongfully and without the leave or license, and against the will of the plaintiff, pulled down, damaged, spoiled, and destroyed a certain chimney, part of the messuage, and pulled down, prostrated, damaged, and spoiled a certain wall, part of the messuage. A plea was delivered on the 20th of Nov. On the 23d, an order was made by CRESSWELL, J., allowing the defendant to amend his plea. On the 24th of Jan., 1844, an order was made by COLTMAN, J., allowing the plaintiff to amend his declaration, without costs of amendment, the learned judge stating to the parties that the order was not to prejudice the defendant as to any right to apply to a court or a judge to strike out counts. On the 7th of March, a declaration was delivered containing the above count and two additional counts; the second count stating that the plaintiff's messuage was an ancient messuage, and that certain parts thereof, to wit, certain walls, and a certain chimney, respectively part thereof, adjoined a messuage of the defendant, and, in part, rested upon, and were, of right, in part supported *by parts of the de- [*626 fendant's messuage, and that the defendant wrongfully removed his messuage without shoring or propping up, or otherwise securing, or

taking other reasonable and proper or any precautions to support or secure, or shore up, the said walls and chimney of the plaintiff's house so as to prevent the same from giving way, and that thereby the plaintiff's messuage was injured; and a third count stating that the defendant so unskillfully conducted himself in the pulling down of his messuage, that divers parts, to wit, certain walls and a certain chimney, of the plaintiff's messuage, became greatly shaken, weakened, and injured.

On the first day of this term, *Byles*, Serjt., moved for a rule to show cause why the amendment of the declaration made in pursuance of the order, should not be disallowed or struck out. He contended, that adding the two counts after an interval of two terms was a violation of the statute 13 Car. 2, st. 2, c. 2, which enacts, (s. 3,) that upon an appearance entered for the defendant by attorney of the term wherein the process is returnable, unless the plaintiff shall put into the court his bill or declaration against the defendant *before the end of the term next following after appearance*, a non-suit (*non pros*) for want of a declaration may be entered against him. If the subject-matter of complaint declared by the additional counts is to be considered as distinct, the amendment is made at a later period than the practice of the courts allows. If, on the other hand, the additional counts declare no ground of complaint distinct from that contained in the first and original count, they contravene the new rule of pleading, R. H. 4 W. 4. (a) He cited *Brown v. Crump*, 6 Taunt. 300; *Freen v. Cooper*, 6 Taunt. 358; 2 Marsh. 60; Tidd Pract. 698; Archb. Pra. 1120.

A rule nisi having been granted,

*627] *Talfourd*, Serjt., now showed cause, and *Byles*, Serjt., was heard in support of the rule. The argument of the learned serjeants turned principally upon long and somewhat conflicting statements in the affidavits as to the understanding between the parties on which the order of the 24th of February was drawn up.

TINDAL, C. J. The only question here is what was, or what ought to have been, the understanding between the parties at the time that my brother COLTMAN's order was pronounced. It appears to my mind that the defendant's attorney must have known that the plaintiff intended to amend his declaration by inserting new counts. It was, no doubt, understood that the amendments should be made within a reasonable time. I think that, on the ground of mutual misunderstanding, the rule should be discharged without costs.

COLTMAN, J. The rule of practice as to not adding counts containing new causes of action after a certain period, is not founded upon any peremptory statute, but upon analogy to the statute of Charles II. The plaintiff would not, under colour of an amendment, be allowed to introduce a new cause of action after the end of the term following that of the appearance. This brings us to the consideration, whether, supposing there had been no declaration at the time this amended declaration was delivered, the plaintiff

(a) 11 Bingh. 463, 3 Nev. & Mann. 1.

could have been non-prossed for not declaring. This, I think, under the circumstances of the case, could not have been done.

ERLE, J. If there had been no declaration, and judgment of *non pros* had been signed, the court would have set it aside.

CRESSWELL, J. This is a question of costs; because if the plaintiff had discontinued and brought a fresh action, *he might have raised the point as to his right to have his wall supported by that of the defendant. [*628
Rule discharged, without costs.

On the 14th of May, the defendant obtained a summons for leave to plead the following matters:—

First, not guilty, by statute.

Secondly, to the first count, that the plaintiff's chimney was a private nuisance.

Thirdly, to the same count, that the plaintiff's chimney was a public nuisance.

Fourthly, to the second count, that the parts of the plaintiff's messuage were not of right supported by, or entitled to be supported by, defendant's messuage.

Fifthly, to the whole declaration, leave and license.

The learned judge, on the authority of *Ross v. Clifton*, 11 A. & E. 631, 1 G. & D. 72, 9 Dowl. P. C. 1033, which was cited on behalf of the plaintiff, made an order that the defendant should elect between the first and fourth pleas, and that the last plea should be allowed, and also one of those.

Byles, Serjt., on a former day in this term, obtained a rule nisi to rescind so much of the said order as directed the defendant to elect between the first and fourth pleas, and that the defendant should be at liberty to plead the following pleas:

First, to the first count, not guilty, by statute.

Secondly, to the same, that the plaintiff's chimney was a private nuisance.

Thirdly, to the same, that the plaintiff's chimney was a public nuisance.

Fourthly, to the second and third counts, not guilty.

Fifthly, to the second count, that the parts of the plaintiff's messuage were not of right supported by, or entitled to be supported by, defendant's messuage.

Lastly, to the whole declaration, leave and license

**Talfourd*, Serjt., now showed cause. A double advantage ought not to be allowed to a defendant in cases where he is at liberty to plead "not guilty" by statute. [TINDAL, C. J. The defendant here seeks to avail himself, by a special plea, of something which he could not set up under not guilty "by statute."] The plea of "not guilty," by statute, does not confine the defendant to the mere question whether the acts complained of were done under the statute; it leaves it open to him to set up other defences. *Ross v. Clifton* is precisely in point. It was there held, in conformity with *Fisher v. The Thames Junction Railway Company*, 5 Dowl. P. C. 773, that where a statute enables defendants to plead the general issue

and give the special matter of defence in evidence, the plea of not guilty, so pleaded, is not affected by the new rules of H. 4 W. 4, but operates as before those rules were framed, letting in not only the defences peculiar to the statute, but all that arise at common law; and therefore the court, in the exercise of its discretion under stat. 4 Ann., c. 16, s. 4, would not give leave to plead not guilty by statute together with a special plea, although such plea raised a defence independent of the statute. [CRESSWELL, J. The result of *Ross v. Clifton* seems to be that not guilty "by statute" has now the same effect as not guilty had before the new rules. TINDAL, C. J. It is not a new point. It was raised in *Haine v. Davey*, 4 A. & E. 892, 6 N. & M. 356.]

Byles, Serjt., in support of the rule. One state of things may arise which was not suggested in *Ross v. Clifton*. Suppose it should appear that the defendant had not acted under the statute, although he may have thought he did, it might be that he could not avail himself of the plea of not guilty by statute. [TINDAL, C. J. If the defendant has neither acted under the *630] act, nor *thought he did so, he clearly has no right to plead not guilty by statute.] A case might happen in which a party might think he was acting under the authority of a statute, and the court might think differently. The party may be under a mistake. [TINDAL, C. J. The courts have given a very large interpretation to these clauses, (a) and have construed them very liberally for defendants, holding that where they had reasonable ground to suppose they were acting under the statute, they might claim the benefit of its provisions.]

Per curiam;

Rule absolute, the defendant to take short notice of trial; the costs of the application to be costs in the cause.

(a) Vide *Theobald v. Crichmore*, 1 B. & Ald. 227; *Smith v. Wiltshire*, 2 Bro. & B. 619; *Eliot v. Allen*, 1 C. B. 18.

BEDELLS and Another v. MASSEY. June 11.

In case for the infringement of a patent, where the effect of the letters-patent is set out. *Semble* that *non concessit* is a good plea.

Held, also, that a plea alleging that the plaintiffs falsely represented to the queen that the invention was an improvement,—that her majesty, confiding in such representation, made the supposed grant,—that such representation was false,—and that the said supposed invention was not an improvement,—might properly be pleaded together with a plea, "that the invention was of no use to the public," the two pleas not being substantially the same. *Held*, also, that the first-mentioned plea was sufficiently described in the abstract as a plea, that "the invention was no improvement."

CASE for an alleged infringement, by the defendant, of a patent granted to the plaintiffs for "Improvements in the manufacture of elastic fabrics and articles of elastic fabrics."

The defendant, who was under terms to plead issuably, obtained a judge's *631] order for leave to plead the *following pleas:—First, *non concessit*—secondly, that the plaintiffs were not the inventors of the supposed

invention—thirdly, that the invention was no improvement—fourthly, that the invention was not new—fifthly, that the invention was not an invention of a manufacture—sixthly, that the invention was of no use to the public—seventhly, that the plaintiffs did not, by the instrument in writing mentioned in the declaration, particularly describe the invention, &c., as alleged—eighthly, that the plaintiffs did not cause any specification to be enrolled in Chancery—ninthly, not guilty.

The first plea, that was afterwards delivered, was as follows:—"The defendant, by T. W., his attorney, says that her said majesty did not give and grant unto the plaintiffs, their executors, administrators and assigns, her especial license, full power, sole privilege and authority, that they the said plaintiffs, their executors, administrators and assigns, by themselves or by their deputy or deputies, servants or agents, or such others as they the said plaintiffs, their executors, administrators or assigns, should agree with, and no others, should, and lawfully might, make, use, and exercise the said supposed invention of improvements in the manufacture of elastic fabrics and articles of elastic fabrics, in the declaration mentioned, in manner and form as in the declaration in that behalf alleged," concluding to the country

The third plea was as follows:—"And for a further plea in this behalf the defendant says, that, before the making of the said supposed letters-patent in the declaration mentioned, to wit, on, &c., the plaintiffs, by their petition in the said supposed letters-patent and declaration mentioned, represented and suggested unto her said majesty that the said supposed invention mentioned in the declaration, and described in the said instrument in writing under the hand and seal of the *plaintiff Caleb Bedells, in the de- [632
fendant's second plea set forth, was an invention of improvements in the manufacture of elastic fabrics and articles of elastic fabrics: and the defendant further says that her said majesty, believing and confiding in, and acting and proceeding upon, the said representation and suggestion of the plaintiffs, and, in pursuance and in consideration thereof, did make the said supposed letters-patent, and also the gift and grant in the declaration alleged to have been made: and the defendant further says that the representation and suggestion so made as aforesaid was false and untrue, and her said majesty was thereby misinformed and deceived, and that the said supposed invention was not an invention of improvements in elastic fabrics and articles of elastic fabrics, in manner and form as by the plaintiffs so falsely and untruly represented and suggested to her said majesty as aforesaid; whereby, and by reason whereof, the said supposed letters-patent were and are null and void." Verification.

Byles, Serjt., on a former day in this term, obtained a rule calling upon the defendant to show cause why so much of the order (and the rule thereon) as authorized the defendant to plead the first and third pleas, should not be rescinded, and why such first and third pleas should not be set aside. He contended that the first plea was not issuable, and that it was frivolous, inasmuch as the defendant was estopped from denying the queen's grant,

except in the case of fraud. He also submitted that the third plea was substantially the same as the sixth, and that it presented a different defence from that presented by the abstract.

Channell, Serjt., (with whom was *Hindmarch*,) now showed cause. The plea of *non concessit* is a perfectly good plea, and has already been pleaded *633] in *Nickels v. The London Caoutchouc Company*, 1 Webster's Patent Cases, 656. There, the declaration stated the patent to be for improvements in machinery for covering fibres, and the letters-patent were for improvements in machinery for re-covering fibres. Various proceedings took place in Chancery in consequence of that plea having been put upon the record; and no one suggested that the plea was not a good one. The object of the defendant in pleading this plea is, to dispute the operation of the grant as set forth in the declaration; and, unless it be allowed, the defendant has no means of putting in issue the effect ascribed to the grant by the plaintiffs. He cannot set out the letters-patent on oyer, and then demur; *Jeffrey v. White*, 2 Dougl. 476; neither can he plead nul tiel record. It is laid down in Co. Litt. 260 a, that, "If a grant by letters-patent under the great seal be pleaded and showed forth, the adverse party cannot plead nul tiel record; for that it appears to the court that there is such a record; but, inasmuch as it is in nature of a conveyance, the party may deny the operation thereof; therefore he may plead *non concessit*, and prove in evidence that the king had nothing in the thing granted, or the like." In *Baddeley v. Leppingwell*, 3 Burr. 1533, 1544, WILMOT, J., says: "*Non concessit* puts the operation of the grant in question. If a man pleads a grant from the crown under the great seal, and the other pleads *non concessit*; in this case the letters-patent are confessed, but the effect and operation of them is denied: the effect of that issue of *non concessit* is, that the crown had nothing in the land, or that the tenements did not pass by the letters-patent. So is *Hynde's* case, in 4 Co. 70 b, and *Eden's* case, in 6 Co. 15 b, expressly. A grant without right, is absolutely void." In *Hynde's* case, to an objection *634] taken, "that records (for the avoiding of infiniteness, which the law abhors) are so high and sacred that they import in themselves inviolable truth; which, if any dare to deny, the law attributes so great honour and credit to them that they shall be tried only by themselves and not by the country:" it was answered and resolved by the court, "that it is true that records import in themselves truth, and conclude all men from denying any thing appearing within the record, as antedate, &c. *Vide* 37 H. 6, 21 b; (a) *Plow. Com. Qu.* 491; 7 & 8 Eliz. Dyer, 242.(b) But to take averment which stands with the record, and which doth not impugn any thing apparent within the record, the law doth well admit and allow: as against a fine upon release, to say that the conusee had nothing at the time of the fine levied; as it is held in 16 H. 7, 5 b. So, against the king's letters-patent under the great seal showed in court, none can deny them, but *non concessit per præd' literas patentes*, is a good plea; for, although

(a) *Quatermein's case*, T. 37, H. 6, fo. 21, pl. 9.

(b) *Quære* this reference.

there be such letters-patent, yet perhaps nothing pass by them, and so, *per consequens, non concessit*. And although enrolment or other matter of record shall not be tried *per pais*, yet the time when the enrolment was made shall be tried *per pais*; for, the enrolment itself shall never be drawn in question, (for that is agreed by both parties,) but only the time of it; as in the other case, where one pleads a grant of the king by his letters-patent under the great seal, and the other pleads *non concessit* by the same letters-patent, in that case the letters-patent are confessed, but the effect and operation of them is denied; and therefore the trial shall not be where the letters-patent bear date, but where the lands lie, as it was adjudged." So, in *Eden's* case,—in "trespass quare clausum fregit apud Mairtham in com. Norf., by Thomas Eden and William Franklyn, against Edward Brown,—the defendant* pleaded that the queen was seised in fee in right of her crown, and, by her letters-patent under the great seal, bearing date [635 at Weldhall, in com. Essex, &c., *concessit tenement. præd. in quibus, &c., cuidam A. B., &c.* The plaintiff took issue *quod non concessit tenement. præd. per prædictas literas patentes*. And this issue was tried in the county of Norfolk, where the land lay, and not where the letters patent bore date; and the jury found for the plaintiff: and it was moved in arrest of judgment, that it ought to have been tried where the letters-patent bore date; *et non allocatur per curiam*; for, the letters-patent being matter of record, and showed to the court under the great seal, cannot be denied, nor can the party plead nul tiel record against them, being showed under the great seal, and therefore the effect of the issue of *non concessit* is, that the queen had nothing in the land, or that the tenements did not pass by the letters-patent, in which case it shall be tried where the land lies; and so it was adjudged." There can be no doubt, on these authorities, that *non concessit* is a good plea. With respect to the third plea, the defence intended to be set up is, that the alleged invention was no improvement. All the statement about the petition is merely introductory; and the nature and object of the plea are sufficiently disclosed in the abstract; for all that is necessary is, that the abstract shall *substantially* describe the plea. [TINDAL, C. J. The question is, whether this plea is not double. Even if that were so, that is not an objection which can be taken on an application like the present. But it is submitted that it is not double. Every plea of this kind, either expressly or by implication, includes a suggestion that the crown has been imposed upon by a false representation: and this, it is conceived, the plaintiffs would be estopped from traversing. A simple plea was pleaded in *Morgan v. Seaward*, 2 M. & W. 544; *which case also shows that the third [636 and the sixth pleas are different; the one raising a statutable objection to the patent, the other a defence by reason of a false suggestion whereby the crown was induced to grant the patent. [COLTMAN, J. Do you consider a false suggestion an essential part of the plea? It is safer for the defendant to have the allegation in the plea; but whether the plea

expressly contains it or not, such a plea is necessarily founded on the fact of a false suggestion.

Byles, Serjt., (with whom was *Mellor*,) in support of his rule. Independently of the defendant being under terms to plead issuably, *non concessit* is an idle and frivolous plea. It is said that there must be some mode by which the defendant may put in issue the letters-patent. A plaintiff, however, cannot declare upon letters-patent without profert. They are therefore before the court, who will take judicial notice of them. But there is no mode of pleading by which a defendant can put them in issue. [TINDAL, C. J. He cannot put in issue the *existence* of the letters-patent, but he may put them in issue *as you have pleaded them*. If a defendant cannot plead *non concessit*, what remedy will he have where they are improperly set out?] That they cannot be set out on oyer is conceded; *Jeffery v. White*, 2 Dougl. 476; *The King v. Amery*, 1 T. R. 149. According to the ancient practice, the court had nothing to do but look at the letters-patent to see that they agreed with the declaration. (a) The same result may now be obtained by affidavit, but not by pleading. *Hynde's case*, and *Eden's case*, *suprà*, 633, show that the existence of the letters-patent cannot be denied. [TINDAL, C. J. They seem to show, at the same time, that *non concessit* may be pleaded.] There is a difference where it is pleaded to a declaration on letters-patent. *Here, it is clearly not an issuable plea.

*637] The statute of 21 Jac. 1, c. 3, enables the crown to grant letters-patent for fourteen years; that is, it enables the crown to do all that it appears upon this record to have done. That, therefore, which cannot be put in issue, is all that *non concessit* can propose to put in issue. That the queen *could* grant is matter of law, and that she *did* grant, cannot be denied. In 2 Rolle's Abridgment, *Prerogative le Roy*, 191, it is said: "Si le Roy graunt terre per ses letters patents desouth le grand seal, et en le inferior parte apres tout lè patent finite ceo est mise (per warrantum commission.) ceo estant fait per warrant del commissioners de *defective titles* sur composition ove eux fait, si les commissioners navoient ascun authority per leur commission a faier ascun composition: en cest case per force de leur commission, et issint cest hors de leur commission, ceux letters patents sont void en ley sans ascun scire facias a eux repealer, et est bon pleader non concessit, &c., encounter ceux letters patent:" which passage is cited in Com. Dig. tit. *Patent*, (F. 1). [MAULE, J. How can the defendant show that the grant is improperly set out, if not in this way?] It cannot be done at all. [MAULE, J. The authorities you have cited show, that in the case of a grant of land, it may be done.] A defendant in such case may show that there were no such lands; but not that the queen did not make such a grant. [TINDAL, C. J. Here, the plaintiffs take upon themselves to state the effect of the grant. They may be wrong. You have not set out the letters patent *in hæc verba*.] The declaration follows the usual course in setting out the legal effect of the grant. If the

(a) Qu. Upon what issue.

defendant may contest the mode in which the plaintiffs have set out the letters-patent, why may he not plead nul tiel record? [TINDAL, C. J. At all events this is too nice a question to be decided in this incidental way. You can demur if you think proper.] How can this be a plea to the merits? * [CRESSWELL, J. If you have pleaded something not granted, then the plea goes strongly to the merits.] If the plea [*638 puts any thing in issue, it is the queen's power to grant by reason of want of novelty or utility; and these are put in issue by some of the other pleas.

As to the third plea, it does not agree with, and is not warranted by, the abstract. It alleges a false suggestion or representation to the crown, which would avoid the patent altogether; and it also denies either the novelty or the utility, it is difficult to say which, of the alleged invention. If an improvement, the invention would be useful to the public.

The third and sixth pleas are substantially the same, and ought not be allowed together.

TINDAL, C. J. The objection to the first of these pleas is, not that it is at variance with the abstract delivered, but that *non concessit* is no plea at all in an action of this nature. I think, however, that it would be too much for us to take upon ourselves to decide that upon a motion like the present. The plaintiffs, if so advised, may demur. The plea has been pleaded; and it seems to me in fact to be the only way in which the defendant can raise the question, whether that which the plaintiffs claim is contained in the grant. The plea puts in issue, not the existence of the letters-patent, but the legal effect of them as stated by the plaintiffs. No inconvenience is imposed on the plaintiffs by allowing this plea: they have only to produce the letters-patent to show that they have truly and properly stated the effect of them in the declaration. As to the third plea, the objections are, that it does not correspond with the abstract, and that it is substantially the same as the sixth plea. I do not think the abstract ought to be considered too critically: all we should see is, that the plea fairly and substantially follows it; otherwise the abstract must be almost a copy of the pleas. The *abstract is, that the invention is no improvement: the third plea, [*639 after stating the petition for the grant, and the grant of the letters-patent, avers that the representation made by the plaintiffs to her majesty, was false and untrue, and her majesty was thereby misinformed and deceived, and that the said supposed invention was not an invention of improvements in elastic fabrics, &c., in manner and form as by the plaintiffs so falsely and untruly represented. Whereby the said supposed letters-patent were and are null and void. That is, in substance, a plea, that the plaintiffs' alleged invention is no improvement. If it turn out that it is an improvement, the plea is answered. It therefore does not seem to me to be the same as the sixth plea; for the invention may be an improvement, and yet it may be of little or no use. I think the rule must be discharged.

COLTMAN, J. It appears to me that the third and sixth pleas do not necessarily raise the same defence.

As to *non concessit*, it puts the plaintiffs under no difficulty. They have nothing to do but to produce an exemplification of the letters-patent to show that the effect of the grant is truly stated in the declaration. If the plea be demurrable, the plaintiffs may demur; but the question is not one that ought to be argued on a motion like the present.

MAULE, J. *Non concessit* appears to have been frequently pleaded; and it seems to me to be the only way in which a defendant can put in issue whether that which the plaintiff claims as having been granted to him, is within the terms of the grant. I think also that it is a plea to the merits, as well as an issuable plea.

The third plea alleges that the grant is void because the queen was induced to grant a monopoly to the plaintiffs by the false representation of *640] the grantee as to the nature of his alleged invention. That also appears to me to be a plea to the merits.^(a) It has been contended that it is double. But I do not think it is a double plea; although it is unnecessary to decide that point.

I also think the third and sixth pleas are not the same, but are essentially different; and for this reason: Supposing it should appear that the plaintiffs' invention, though an improvement, would operate as an injury to the public, that would be a defence that could not be given in evidence under the third plea; but it would be admissible under the sixth.

It is said that the third plea does not agree with the abstracts; but it appears to me that they sufficiently correspond. Abstracts should not be too critically construed, otherwise we shall make them identical with the pleas.

CRESSWELL, J., concurred.

Rule discharged, with costs.

(a) Vide *anté*, Vol. IV. p. 995.

CROSS v. ROBERTSON. June 11.

Where the plaintiff had become bankrupt after issue joined, the court discharged a rule for judgment as in case of a nonsuit, and refused to direct a *stet processus*.

ASSUMPSIT for goods sold and delivered. After issue joined, the plaintiff became bankrupt.

Clarke, Serjt., having obtained a rule nisi for judgment, as in case of a nonsuit,

Byles, Serjt., *contra*, submitted that the plaintiff had been guilty of no default.

*641] Clarke, Serjt. At all events this is a proper case for a *stet processus*. [TINDAL, C. J. You may give it so far as *you are

concerned. The assignees may do as they like. Have they taken the cause up? *Byles*, Serjt. That does not appear the one way or the other.]

TINDAL, C. J. The defendant may take down the cause by proviso, if he pleases. I think this is a case in which we ought not to be called upon to interfere.

The rest of the court concurred.(a)

Rule discharged.

(a) See R. M. T. 1654, a. 21, H. T.; 2 W. 4, a. 71, *Impey*, C. P. 6th edit. 322, *Tidd*, 9th edit. 670, 671.

PALMER v. REIFFENSTEIN.(a) June 11.

The court permitted bail to take out of court money which he had paid in for the defendant's use on a motion for a commission to examine witnesses abroad, the defendant having died abroad, intestate and insolvent, before the trial—the rule nisi having been served on all persons in any way interested in the cause.

SHEE, Serjt., on a former day in this term, obtained a rule calling upon the plaintiff to show cause why the sum of 100*l.* paid into court in pursuance of a rule of the 31 Jan. 1839, should not be paid out to one Timbrey, or to Crosby, his attorney.

The motion was founded on an affidavit of Timbrey, which stated that the defendant having been, in March, 1838, arrested in this action at the suit of the plaintiff, and held to bail in the sum of 180*l.*, the deponent, with J. E. Reiffenstein, the son of the defendant, became bail above for the defendant, and justified as such bail in the sum of 360*l.*; that, shortly afterwards the defendant proceeded to parts beyond the seas, leaving the deponent and the said J. E. Reiffenstein liable as such bail as aforesaid [*642 for the appearance of the defendant, in the event of the plaintiff obtaining a verdict and judgment in the action; that the deponent was informed by Messrs. Webber and Bland, who at that time were the attorneys of the defendant, (and which information the deponent believed to be true,) that the defendant had a good defence upon the merits; but that, pursuant to a rule made in this cause by this court, it was requisite that 100*l.* should be paid into court by or on behalf of the defendant, in order that the time for the examination of witnesses under a commission sent to Canada, might be extended; that the deponent, at the suggestion of Webber and Bland, furnished them with the sum of 100*l.* for such purpose, which sum *was furnished by the deponent out of his own proper money*, and was, as the deponent was informed and believed, paid into court on or about the 15 Feb. 1839, where the same now remains to abide the further order of the court; that the sole object for which the deponent advanced the 100*l.* was for his own protection, and that the defendant might have the full benefit of the evidence under the said commission in Canada,

(a) Vide *antè*, Vol. I. p. 94.

and, by obtaining a verdict in this action, might release the deponent from his liability as such bail as aforesaid, the deponent being apprehensive that, in consequence of the defendant and his said son, the deponent's co-bail, being both absent abroad, the deponent would become solely responsible for the debt and costs in the action, should the plaintiff, by any want of due care on the part of the defendant, obtain a verdict; that the deponent had not been reimbursed by the defendant the said sum of 100*l.*; that, pending the proceedings in this action, and before any verdict was recovered or judgment obtained therein, viz. on or about the 7th of March, 1840, the defendant departed this life, whereby, as the deponent was advised and believed, the action became abated; that no verdict or *643] judgment had ever *been obtained in the action; *and that, at the time of such payment into court as aforesaid, the deponent was not indebted to the said defendant.*

At the suggestion of the court, the words in italics were added to the affidavit, and notice of the rule was likewise directed to be given to Webber and Bland.

The facts stated in Timbrey's affidavit were corroborated by an affidavit of J. E. Reiffenstein, the defendant's son, who stated in addition that the defendant died at New York intestate, leaving a widow and three children, and that at the time of his death he was in an embarrassed state; that no letters of administration of his goods had been, or were likely to be, applied for or obtained, and that no legal personal representative of the defendant had been appointed either in this country or in New York, or elsewhere; and that his widow was now resident in Canada, and was aware of the intended application to this court on behalf of the said Timbrey, to have the said sum of 100*l.* paid out of court to him the said Timbrey, and that she had no objection thereto, but, on the contrary, was desirous, as was also the deponent, that the said sum of 100*l.* should be repaid to the said Timbrey.

Shee, Serjt., now moved to make the rule absolute, on an affidavit of service thereof upon the plaintiff, upon his attorney, upon Webber, one of the partners in the late firm of Webber & Bland, upon Mr. Johnson, the official assignee, upon Mr. C. Harden, the trade assignee, under a fiat issued against Webber & Bland, upon the solicitor to the fiat, and also upon a clerk in the office of the gentleman who had succeeded to Webber & Bland's business. As to Bland, the affidavit stated that he was residing in Jamaica, in the West Indies.

*644] *TINDAL, C. J. It seems to me, under the circumstances, that the party has done sufficient to entitle him to have his money out of court.

The rest of the court concurred.

Rule absolute.

HARVEY v. WATSON. June 12.

In trespass for crim. con. the court permitted the defendant to plead not guilty, and also, *valet quantum*, that, before and at the time of the committing of the trespass, the plaintiff had relinquished and renounced the comfort and fellowship of his wife, and had finally separated himself *by deed* from her, and was living apart from her.

TRESPASS, for criminal conversation.

Dowling, Serjt., on a former day in this term, had obtained a rule nisi to plead not guilty; and also a plea that, "before, and at the time of, the committing of the trespass, the plaintiff had relinquished and renounced the comfort and fellowship of his wife, and had finally separated himself *by deed* from, and was living apart from, her." In *Weedon v. Timbrell*, 5 T. R. 357, it was held that no action can be brought for any act of adultery after a separation between husband and wife. Lord KENYON says, "What injury is done to the plaintiff, who has voluntarily relinquished his wife? It cannot be said that he is deprived of the comfort and society of his wife. I can see the immorality of the defendant's conduct in as strong a light as any person; but still, this action must be confined within legal limits. This is like the case of an action by a father for the loss of service of his child; in which, however the parent may feel for the violation of his daughter's chastity, it is clear that no action can be maintained, unless some *evidence be given that the daughter performed some acts of service (a) [*64£ for the father. (b) This is not like the instance put of a temporary separation from the wife; in such case the wife still continues within the protection of the husband; which she does not here." [TINDAL, C. J. Is *Weedon v. Timbrell* still considered an authority?] It is so treated in 2 Roper on Husband and Wife, 323, n., 2 edit. by Jacob, where a MS. case of *Graham v. Wigley* is cited. *Bartelot v. Hawker*, Peake, N. P. C. 7, and *Hodges v. Windham*, Ib. 39, are to the same effect.

Byles, Serjt., now showed cause. It is impossible to treat a separation between the husband and wife as a *bar* in an action of trespass for debauching her, although it may affect the amount of damages. *Weedon v. Timbrell* can hardly be regarded as an authority in the present day. The question arose in the subsequent case of *Chambers v. Caulfield*, 6 East, 244, 2 J. P. Smith, 356, before Lord ELLENBOROUGH, who "desired that the case might be argued upon the general point,—whether the mere fact of a separation between husband and wife by deed was such an absolute renunciation of his marital rights as precluded the husband from maintaining an action for the seduction of his wife—saying that he did not consider that question as concluded by the decision in *Weedon v. Timbrell*." The correctness of Lord KENYON's judgment in that case is doubted in *Selw. Nisi Prius*, 8th ed

(a) It was said by HULLS, (Hulse, Just. of B. R.,) "If a man does me service and remain with me at his will, if he be beaten I shall have an action thereof, because of losing his service."

The report concludes with "*Quære, de dicto Hull.*"

(b) Vide *Grinnell v. Wells*, M. T. post.

pp. 12, 13. *Winter v. Henn*, 4 C. & P. 494, and *Wilton v. Webster*, 7 C. & P. 198, were also cited.

*646] *Dowling*, Serjt., in support of his rule. It is not necessary to prove that the plea will stand the test of a demurrer; for unless the court can treat it as frivolous, it ought to be allowed. *Weedon v. Timbrell* has never been overruled.

TINDAL, C. J. If there be any reasonable doubt as to this plea it ought to be allowed, leaving the plaintiff to demur. I do not say that the plea is good; but after the judgment of the court of King's Bench in *Weedon v. Timbrell*, I think it would be too much to say that it is so bad a plea that we should not permit it to be placed on the record.

The rest of the court concurred.

Rule absolute.

STEAD v. CAREY. June 12.

Obtaining time to reply is a waiver of any objection to the defendant's non-compliance with an undertaking to plead issuably.

CASE, for infringing a patent granted to the plaintiff for wood-paving. On the 6th of May, the defendant, who was under terms to plead issuably, delivered nine pleas. On the 14th of May, the plaintiff took out a summons before CRESSWELL, J., for leave to sign judgment on the ground that two of the pleas delivered were not issuable pleas, and, at the same time, took out a summons for time to reply, both of which summonses were served together. The parties attended before COLTMAN, J., on the 16th, when the plaintiff abandoned the former summons, and obtained, under the latter, an order for a week's time to reply. On the 23d, the plaintiff signed judgment.

*647] *Manning*, Serjt., on a former day in this term, having obtained a rule nisi to set aside this judgment for irregularity,

Shee, Serjt., (with whom was *Webster*,) now showed cause. The question is, whether the plaintiff, by obtaining time to reply, took a step so as to preclude him from objecting to the pleas. [MAULE, J. Was not the judgment signed after the expiration of the original time to reply?] In an *Anonymous case*, 1 Dowl. P. C. 23, PARKE, B., says: "Asking for time is an admission that the plaintiff is in a situation to go on; but I do not know that it is an admission that the step was regular." It is submitted that asking for time to reply cannot, properly speaking, be considered a step; nothing new is introduced on the record.

Manning, Serjt., (with whom was *Addison*,) in support of the rule. By obtaining time to reply, the plaintiff waived any objection on the ground of a non-compliance on the part of the defendant, with his undertaking to plead issuably. The point was expressly decided in *Trott v. Smith*, 9 M. & W. 765, 2 Dowl. N. S. 278. Lord ABINGER there says: "Here, the plea is voidable by the agreement of the parties, but not absolutely void on

the face of it. The plaintiff might, at once, treat it as a nullity; but surely he could not do so at the moment before trial, after he had replied, and issue was joined." And PARKE, B., said: "If the plaintiff had replied to this plea, he certainly could not afterwards have signed judgment: then, does he not, by applying for time to reply, admit that there is something to reply to? whereas his case now is, that the plea ought not to be upon the file at all, by reason of the non-compliance with the judge's order.

*TINDAL, C. J. The case cited is conclusive. By issuing and *[*648*
serving a summons for time to reply, the plaintiff took a step; and
 he could not afterwards object that the pleas were not issuable.

Per Curiam;

Rule absolute.

BRISTOWE v. NEEDHAM. June 12.

One judgment may, upon motion, be set off against another judgment between the same parties in a different court, provided the parties are interested in their respective judgments in the same right.

CASE for vexatiously causing the plaintiff to be arrested for 750*l.*, under a judge's order, which was afterwards set aside.

On the 4th instant the plaintiff took out a rule to discontinue on the usual terms.

On the following day,

Dowling, Serjt., obtained a rule, calling upon the defendant to show cause why the costs payable to him upon the rule to discontinue in this cause, should not be set off against a judgment for 22,350*l.*, recovered against him by the plaintiff, in the court of Exchequer, in Easter term, 1842.

Shee, Serjt., now showed cause. His affidavits stated, that the plaintiff was not personally interested in the proceedings in the Exchequer, the judgment against the defendant in that court having been obtained by the plaintiff as trustee under the defendant's father's will.

Dowling, Serjt., in support of his rule. It is unnecessary to cite cases to show that a judgment in one court may be set off against a judgment in another court: it is matter of every day's practice. There is no- *[*649*
 thing to distinguish this case from others. [TINDAL, C. J. One
 objection is, that we cannot grant this application to the injury of third parties. It appears from the affidavits that the judgment in the Exchequer is for *trust* money.] There is no doubt that it was trust money that the plaintiff lent to the defendant. But having lent it improperly, he did not do so in the character of a trustee: he is therefore, as between the two parties, a common creditor for the money.

TINDAL, C. J. Many cases show that a judgment obtained by one party may be set off against a judgment obtained against him by the other party. The present case, however, does not come within the class of cases in which such a set-off has been allowed. It is no objection that the one is a judg

ment in this court and the other in the court of Exchequer ; but it appears that the fund in the latter case is not available for the purpose of a set-off, the judgment having been recovered by the plaintiff as a trustee, and not in his individual right. If the plaintiff were allowed to set off any portion of that judgment against the judgment obtained by the defendant here, the latter might still be called upon to satisfy the full amount of the former judgment.

Per Curiam ;

Rule discharged.(a)

(a) *Vide antè*, 589 (a).

*650] *MARTYN and Another v. GRAY. June 12.

An affidavit stating that process into county A. was served in county B., more than 200 yards from the boundary, is sufficient to ground a motion to set aside the service, without negating the existence of any dispute as to the boundary.

CHANNELL, Serjt., on a former day in this term, obtained a rule nisi to set aside the service of a writ of summons, the writ being issued into Middlesex, and the plaintiff having been served in London.

The affidavit upon which the application was made, stated that the defendant was served at "Garraway's Coffee House, Change Alley, Cornhill, in the city of London ; that Garraway's Coffee House aforesaid is in the city of London, and more than 200 yards from the border of the county of Middlesex ; and that the defendant had not been served with any other process in the action than the copy of writ of summons annexed to the affidavit."

Dowling, Serjt., now showed cause. The affidavit is insufficient. It is not enough in a case of this sort, to state that the place where the process is served is not within 200 yards of the border of the county into which it issues, without averring that there is no dispute as to the boundaries ; *Webber v. Manning*, 1 Dowl. P. C. 24. [TINDAL, C. J. The question is, from which side that fact should come. MAULE, J. When the service is stated to be *on* the border, it must be shown that there is no dispute as to boundary. It is necessary to negative dispute, where it is sworn that the place of service is not within 200 yards of the border. It is rather hard to call upon a man to swear that there is no dispute as to the boundary of a county.] It is the ordinary course to do so.

*651] *Channell, Serjt., in support of his rule. Where it is distinctly sworn that the service took place more than 200 yards from the border, it is sufficient. In *Harrison v. Wray*, 11 M. & W. 815, 1 Dowl. & L. 366, the defendant, in his affidavit, stated that he had been served, in Cheapside, in the city of London, with a copy of a writ of summons, issued into the county of Middlesex, and that he had been informed and believed that any portion of Cheapside was more than half a mile from the county of Middlesex. [TINDAL, C. J. The argument would be the same if the place of service was six miles from the border.] But Lord ABINGER said

that "the affidavit should have stated positively that the place of service is not within the county into which the writ issued, or within the distance from the boundary limited by the act of parliament," 2 W. 4, c. 39, s. 1. Here, the affidavit distinctly states those facts.

TINDAL, C. J. That appears to be the sensible construction of the act.

The rest of the court concurring, Rule absolute, without costs.

*BENTLEY v. KEIGHLEY and Another. June 12. [*652

In case for infringing of a patent for improvements in machinery, the notice of objections delivered pursuant to 5 & 6 W. 4, c. 83, s. 5, stated that the invention was known to, and used by, A. and B., and others, before the grant.—The court refused to require the defendant to strike out the words "and others."

CASE, for infringing a patent for improvements in machinery or apparatus for making cards for carding cotton, wool, silk, and other fibrous substances, granted to one William Carr Thornton, and, by him, assigned to the plaintiff.

By the specification, Thornton, the inventor, claimed six separate and distinct alterations as improvements in the machinery for making cards, and also the improvement in the machinery produced by six alterations collectively.

The defendants delivered the following particulars of objections pursuant to the 5 & 6 W. 4, c. 83, s. 5, amended under a judge's order:—

"Take notice that the defendants, on the trial of this cause, besides denying the infringement of the patent and the title of the plaintiff, will rely on the following objections to the validity of the letters-patent mentioned in the declaration, that is to say—

"First—that the invention was not new at the time of granting the letters-patent:

"Secondly—that, before, and at the time of, granting the letters-patent, the invention, and each of the six parts thereof, were known to *Mordecai Robertshaw and others*; and that, from them or some or one of them, Thornton, the patentee, obtained or derived his knowledge of the said invention:

"Thirdly—that Thornton was not the first and true inventor of the said invention or of any part thereof; and that *Mordecai Robertshaw*, *James Walton*, and others, were, respectively, the first and true inventors of the said invention and of each part thereof, except the fourth part thereof: [*653

"Fourthly—that the invention, at the time of granting the letters-patent, was not, nor was any part thereof, new, as to the public use and exercise thereof in England; and that the said invention and each part thereof, except the fourth part thereof, before the granting of the said letters-patent, were used by the said *Robertshaw* and *Thornton*, and others, in England:

"Fifthly—that the specification of the invention is insufficient, and that

it is uncertain; that it does not describe the nature of the invention, or in what way it is to be, or may be, used, with sufficient particularity; and that the specification is not sufficiently intelligible to enable a workman of competent skill, to make, construct, put in practice, or use the said invention in all its parts:

"Sixthly—that the invention is not, and that no part thereof is, and particularly the fourth part thereof, is not, the subject of a patent:

"Seventhly—that the said invention was and is, and particularly the fourth part thereof, was and is, useless, trivial, immaterial, valueless, and unnecessary for effecting the purpose proposed:

"Lastly—that the specification was not enrolled in time."

Channell, Serjt., on behalf of the plaintiff, in Easter term last, obtained a rule nisi calling upon the defendant to deliver further and better particulars of objection; *Jones v. Berger*, antè, Vol. V. p. 208, 6 Scott, N. R. 208.

Talfourd, Serjt., now showed cause. The question is, whether the court
 *654] will abide by its ruling in *Jones v. Berger*, or adopt the subsequent decisions in the Queen's Bench in *Reg. v. Walton*, 2 Q. B. 969, and in the Exchequer in *Russell v. Ledsam*, 11 M. & W. 647, 1 Dowl. & L. 347,—whether it will hold that the defendant is bound to give the names of *all* the persons to whom the invention was alleged to have been personally known, or whether leaving out the names of some, he may refer to them by inserting the words "and others." In *Bulnois v. Mackenzie*, 4 New Cases, 127, 5 Scott, 410, 6 Dowl. P. C. 215, this court held, that, where the objection to the patent is, its want of novelty, and the defendant intends to rely on a previous user by divers persons, he cannot be compelled, in his notice, to give the names and descriptions of those persons. In *Fisher v. Dewick*, 4 New Cases, 706, 6 Scott, 208, 6 Dowl. P. C. 739, however, the court held a notice of objection stating "that the said improvements, or some of them, had been publicly and generally used long before the granting of the letters-patent," to be insufficient. In *Jones v. Berger* an objection stated "that the said invention was practised by persons engaged in the manufacture and finishing of lace and similar fabrics at *Nottingham and elsewhere*, before, and at the time of, the grant of the letters-patent:" and this court struck out the words "and elsewhere." But, in *Regina v. Walton*, where, on a *scire facias* to repeal a patent, the prosecutor having, while the record was in chancery, (a) filed notice of objections under the statute, viz., that *other persons* than the patentee had used the invention in England before the grant of the patent, the court of Queen's Bench refused to order delivery of a particular stating the names and addresses of such persons, Lord DENMAN, in delivering the judgment of the
 *655] court, saying: "We agree with the Master of the Rolls (b) rather than with the court of Common Pleas, and think that the particular

(a) Vide antè, Vol. VI. 257, n.

(b) Sir C. C. Pepys, who had refused to make such an order.

should not be ordered." In *Russell v. Ledsam*, the defendant having pleaded that the patentee was not the true and first inventor, it was held that it was not necessary that, in his notice of objections, he should state *who* the first inventor was, or under what circumstances the invention had been used. PARKE, B., there says: "This was an application for better particulars of objections to a patent, under the 5 & 6 W. 4, c. 83, s. 5: and the principal point discussed was, whether or no it was necessary,—in an objection on the ground that the plaintiff was not the first inventor, or that the invention was not new,—that the defendant should state, who was the first inventor, or where, and in what place, and under what circumstances, it was used before. This point is not new; for it has been already before this court, and also before the court of Common Pleas in the case of *Bulnois v. Mackenzie*. In that case the court of Common Pleas would not require those particulars to be given; and their example has been followed by this court in the case of *Heath v. Unwin*, 10 M. & W. 684. In the subsequent case, however, of *Jones v. Berger*, the court of Common Pleas deviated from their former decision in *Bulnois v. Mackenzie*, and compelled the defendant to give the name of the first inventor. On consideration of the matter, however, we think that we ought to abide by the cases of *Heath v. Unwin* and *Bulnois v. Mackenzie*, and that no particulars of the circumstances under which this invention may have been previously used, should be required from the defendant; and we are fortified in this view by the decision of the court of Queen's Bench in the case of *Regina v. Walton*, in which they adopted the same view. That was originally an application to the Master of the Rolls, *which afterwards came before the [656 court of Queen's Bench, which we find, on inquiry,(a) to have determined this point the same way. On the authorities, therefore, we are bound to say that no such particulars ought to be required as are here asked for; and the argument of Mr. Henderson is very strong to confirm the propriety of that course,—viz., that, to require the defendant to afford this information, would be throwing the burden of proof on the wrong party. [MAULE, J. The plaintiff may know one person, and he may know that there are others who have used the article. Suppose the patent to be for an improvement in shipping, and the defence relied on were that it had been used before, the defendant would not be bound, in his particular, to state the names of all the owners of all the ships in which he had seen the alleged improvement applied. But, if he states that the invention has been published to the world in a certain magazine or journal, and also in other books and writings, he ought to specify all the books and writings.] The defendants rely on *Bulnois v. Mackenzie*, in this court; *Russell v. Ledsam*, in the Exchequer, and *Regina v. Walton* in the Queen's Bench, and before *Pepys*, Master of the Rolls. [MAULE, J. I see nothing in *Jones v. Berger* inconsistent with the other cases. The defendant must know in what books he had seen the invention, and in what places, besides Notting-

(a) The case of *Regina v. Walton* had not been reported at the time of this argument.

ham, he had ascertained that it had been practised. (a) TINDAL, C. J. The case of *Russell v. Ledsam* seems to go the length of deciding that no names at all need be given.]

Channell, Serjt., (with whom was *Webster*), in support of the rule. *Bulnois v. Mackenzie* is the first case in *which an opinion was expressed *657] upon the point. In the second case, *Fisher v. Dewick*, the Lord Chief Justice struck out the words "or some of them." In *Russell v. Ledsam*, the court of Exchequer considered the case of a *scire facias* as standing upon a different footing from an ordinary action between subject and subject. In *Regina v. Walton*, the Master of the Rolls expressed no adherence to either class of cases. The cases relied on by the defendant are opposed by *Fisher v. Dewick*, *Jones v. Berger*, and *Galloway v. Rleaddon*, where COLTMAN, J., ordered names, addresses, and descriptions to be given, and the words "divers other persons" to be struck out. 1 *Webster's Patent Cases*, 268, note a. (b) The question is to which class of cases the court will adhere.

TINDAL, C. J. It certainly does appear that other courts have taken a view of this subject somewhat different from that entertained by this court in the recent case of *Jones v. Berger*. Upon the whole, I incline to think that the words excepted to in this case, "and others," ought not to be expunged. No fraud on the part of the defendants, or any intention to embarrass or mislead the plaintiff, is suggested. It may be that they are in possession of the names of some of the parties, but are unable to give the names of the others.

COLTMAN, J. The statute only requires notice of *the* objection upon which a defendant means to rely.

*658] *MAULE, J. I incline to think that the objections in this case are stated with sufficient particularity. It is extremely difficult to *define* the exact degree of particularity which ought to be required; but it should not be greater than the knowledge of the party making the objection may be presumed to enable him to give. This court proceeded upon that principle in *Jones v. Berger*. That case appears to me to be consistent with our holding, in the present case, that, the names need not be given. There is not the same presumption here which arises where books and places (c) are referred to. Rule discharged. (d)

(a) *Post*, 658 (a).

(b) But, in a subsequent case, (*Carpenter v. Walker*), the objection stated the making of locks similar to the subject of the patent by the defendant *and others*, several years before the date of the letters-patent, and their sale to *divers persons, and among others*, to one S. T., of, &c.: on summons to strike out the words "to divers persons, and among others," or to state the names and descriptions of the others besides S. T. to whom the sales were made, the parties were referred to the court, who refused the application. *Ibid*.

(c) *Quare*, whether a party ought to be required to remember the books and places in which he has seen that which, at the time, was wholly immaterial, and in which he had then no interest, or the books or places in which others have seen statements or observed facts, which they have communicated to him, accompanied or unaccompanied by any specification of books or places.

(d) "Note, that Choke (Sir Richard Choke, created a justice of this court in October, 1471, and again,—after the restoration of Edward IV., or his reception of royal power,—in May, 1473)

took a diversity,—that where an action of trespass in *quare servientes suos verberavit*, or *tenentes suos verberavit*, per quod a tenurâ suâ recesserunt, he shall not show the names of his servants or tenants in the writ. But if the writ be brought *quare servientem suum*, or *tenentem suum verberavit*, he must show the name in the writ; *et cum hoc concordat* the form in Chancery." T. 14 E. 4, fo. 7, pl. 13.

Here, the object would rather appear to have been, to avoid prolixity of statement.

*ANN ROBERTS v. TAYLOR and Others. June 12. [*659

The court refused to interfere, by directing issues in law to be argued before the trial of issues in fact; it not appearing that the decision of the former would have any bearing on the latter.

TRESPASS quare domum fregit. The declaration contained five counts: the first was for breaking and entering the dwelling-house of the plaintiff; the second, for amoving therefrom certain fixtures; the third, for expelling and amoving the plaintiff; the fourth, for assaulting the plaintiff, and beating, bruising, wounding, biting, and ill-treating her; and the fifth, for seizing and carrying away, and converting, certain goods and chattels of the plaintiff.

Pleas: first, not guilty; secondly, (to the first and third counts,) that the dwelling-house in which, &c., was not the dwelling-house of the plaintiff; thirdly, (to the second count,) that the fixtures were not the fixtures of the plaintiff; fourthly, (to the whole declaration,) *liberum tenementum* in one J. Wilson; and that the defendants entered as the servants of Wilson and by his command, and committed therein the trespasses in the first count mentioned; that the fixtures in the second count mentioned were part and parcel of the dwelling-house and of Wilson's freehold; that the plaintiff, just before, and at, the times when, &c., in the third and fourth counts mentioned, was unlawfully in possession of the dwelling-house, and making a noise and disturbance therein, without the leave or license of Wilson, and refused to depart; whereupon the defendants, as the servants of Wilson, and by his command, in the defence of his possession of the dwelling-house, gently laid their hands on the plaintiff in order to expel, and did expel her therefrom; and because she resisted, and assaulted the defendants, and used violent and menacing language and gestures towards them the defendants, did *necessarily a little beat, bruise, wound, bite, and ill-treat her, &c.; and, because the goods and chattels in the last count mentioned had been wrongfully put and placed, and then wrongfully were, in and upon the dwelling-house, encumbering the same, the defendants as the servants of Wilson and by his command, seized, took, and amoved them, and carried them to a small and convenient distance in that behalf, &c.; fifthly, (to the first and last counts,) that before the plaintiff was possessed of, or had any title to, or estate, or interest in, the dwelling-house, Wilson was seised thereof in his demesne as fee, and demised to Roberts, as tenant from year to year; that rent was in arrear to Wilson; and that the defendants, as the servants of Wilson and by his command, entered to distrain, &c.; sixthly, (to the first and third counts,) leave and

license; seventhly, (to the whole declaration,) that, before the plaintiff was possessed of, or had any title to, or estate, or interest in, the said dwelling-house, Wilson was seised thereof in fee, and, by agreement in writing, demised the same to Roberts, as tenant from year to year, at a certain rent, and Roberts thereby agreed, that, "if the said rent or any part thereof should be unpaid fourteen days next after any day on which such rent, or any quarterly part thereof, should become due, it should be lawful for Wilson to enter the said dwelling-house, without any ejectment or process at law, and to have again and repossess the same, and all occupiers thereof to expel and remove;" that rent being in arrear to Wilson, the defendants, as his servants and by his command, after the expiration of the fourteen days, entered the said dwelling-house under the power in the agreement contained, and the same had again, and repossessed, for and on behalf of Wilson; and because the plaintiff was in the occupation and possession thereof, without the leave or license and against the will of Wilson, and

*661] refused to depart therefrom, the defendants expelled her therefrom, and, because she resisted, they assaulted, and a little beat, bruised, bit, and ill-treated her, &c.; and, because the goods and chattels in the last count mentioned had been, and were, wrongfully in the dwelling-house, the defendants, as servants of Wilson and by his command, seized and amoved them, &c.; eighthly, (to the first, third, fourth, and fifth counts,) that, before the plaintiff was possessed of, or had any title to, or estate, or interest in, the said dwelling-house, Wilson was seised thereof in his demesne as of fee, and by agreement in writing demised the same to Roberts, to hold from year to year, at a certain rent; that Roberts thereby agreed with Wilson "to repair, and keep in tenantable repair, the said dwelling-house during the continuance of the said demise and tenancy, and it was thereby further agreed, that, if Roberts should break the said agreement in any respect, or if he did not repair, or keep in tenantable repair, the said dwelling-house during the continuance of the said demise and tenancy, or if the said rent, or any part thereof, should be unpaid fourteen days next after any day on which such rent, or any quarterly part thereof, should become due, then it should be lawful for Wilson to enter the said dwelling-house, without any ejectment or process of law, and to have again and repossess the same, and all occupiers thereof to expel and amove therefrom; that Roberts entered by virtue of this agreement and demise; that he suffered the premises to be out of repair; and that thereupon the defendants, as the servants of Wilson and by his command, entered upon the dwelling-house for breach of the agreement, and the same had again and repossessed for and on behalf of Wilson; and because the plaintiff was unlawfully there, the defendants expelled her, &c.

The plaintiff joined issue on the first, second and third pleas—and to the

*662] fourth (so far as it related to the *first count) he replied, that, at the said time when, &c., in that count mentioned, the plaintiff was lawfully possessed of the dwelling-house in which, &c., and was lawfully enti-

pled to her possession thereof as against the defendants; *without this* that the plaintiff was unlawfully in possession or occupation of the dwelling-house in which, &c., in manner and form as in the said fourth plea so far as it related to the first count in that behalf was alleged—similar replications to the fourth plea, so far as that plea related to the second and third counts respectively; to the same plea, so far as it related to the fourth count, excess; and, so far as it related to the fifth count, that the defendants converted and disposed of the goods and chattels to their own use; to the fifth plea, a traverse of Roberts's tenancy under Wilson; to the sixth plea, a traverse of the leave and license; to the seventh plea, (so far as it related to the first count,) a traverse of Roberts's tenancy under Wilson—to the same plea, similar replications, so far as that plea related to the second and third counts respectively; to the same plea, so far as it related to the fourth count, excess; and, so far as it related to the fifth count, that the defendants converted and disposed of the goods to their own use; to the eighth plea, so far as it related to the first and third counts respectively, traverses of the tenancy of Roberts under Wilson; to the same plea, so far as it related to the fourth count, excess; and, so far as it related to the fifth count, that the defendants converted and disposed of the goods to their own use.

The defendants demurred specially to the replications to the fourth plea, and to the replication to the eighth plea, so far as the same related to the fifth count. They joined issue on the replications to the fifth and sixth pleas, and also on the replication to the seventh plea, so far as it related to the first, second and third counts; and on the replication to the last plea, so far as it related *to the first and third counts. To the replication [663 to the seventh plea, so far as it related to the fourth count, they re-joined by denying the alleged excess, and, so far as it related to the last count, by denying the conversion; and to the replication to the eighth plea, so far as it related to the fourth count, by denying the alleged excess.

Dowling, Serjt., on a former day in this term, obtained a rule calling upon the plaintiff to show cause why the trial of the issues in fact should not be postponed until after the issues in law joined between the parties had been argued and determined. He cited *Burdett v. Coleman*, 13 East, 27.

Talfourd, Serjt., now showed cause. There is no pretence for the present application. The fourth count for an assault is entirely unconnected with the demurrers to the other parts of the pleadings; and the court will not interfere to take the conduct of the cause out of the plaintiff's hands, unless a strong case of injustice and inconvenience to the defendants can be made out.

Dowling, Serjt., in support of his rule. No doubt, the general rule is, that a plaintiff may marshal the order between issues in law and issues in fact. The court will, however, for the purposes of justice, exercise a discretion, as appears from *Burdett v. Coleman* and *Crucknell v. Trueman*, 9 M. & W. 684. This is clearly a proper case for their interference, for otherwise great difficulty will arise in assessing the damages on the different counts

[MAULE, J. I apprehend that a plaintiff always has the right to have the damages distinctly assessed on the different counts, as some of them may be bad.] Supposing the court not to interfere, and the demurrers to come on *664] for argument *after the trial of the issues of fact, the court may think that some of the pleadings require amendment, but it would not then amend them. [TINDAL, C. J. If either party will want to amend, it will be the plaintiff, who gives up his chance of doing so by going to trial.]

TINDAL, C. J. The case you refer to, *Burdett v. Coleman*, was one in which it became very important to settle the law, and, for that purpose, to allow the demurrers to be argued first. Here the declaration contains a distinct count for an assault; and I do not see how we should be justified in preventing the plaintiff from going to trial on the issues of fact, as the defendants have failed to satisfy us that the decision of the demurrers would have any bearing on the issues of fact raised on that count.

The rest of the court concurred.

Rule discharged with costs, to be costs in the cause. (a)

(a) At the trial of the issues of fact, the plaintiff obtained a verdict with 10*l.* damages. She afterwards succeeded upon both of the demurrers—the court holding the fourth plea to be bad, and the replication to the eighth plea to be good.

665*]

*KEELE v. WHEELER. June 6.

Under a port-improvement act, commissioners were empowered to raise money upon instruments known as Old-Pier Bonds. These bonds were for 100*l.* each, and were issued at 5 per cent. interest, with the exception of eight which were granted in the same form, but upon which a memorandum was endorsed, before the execution of the bonds, whereby the obligee agreed to accept 4 per cent., provided the payments were regularly made. A., being holder of these eight bonds, was applied to by C., a broker employed to purchase such securities for B., and A. agreed to sell to B. "eight Old-Pier Bonds for 100*l.* each," nothing being said as to the rate of interest. The bonds were left with C. for the purpose of transfer, and remained with him two days. C. prepared a transfer and got it registered, and then discovered that interest was, by the memorandum, limited to 4 per cent.; upon which he immediately repudiated them.

In assumpsit by A. against B. for not accepting and paying for the bonds, the jury found, "that the bargain between C. and B. was for Old-Pier Bonds of the usual sort, at 5 per cent.; but that A. only intended to sell bonds at 4 per cent."

Held, that the verdict was thereupon properly entered for B.

ASSUMPSIT. The first count of the declaration stated that the plaintiff, on the 14th of September, 1842, was lawfully possessed of, and entitled to, eight securities for money, that is to say, a certain assignment bearing date the 18th of August, 1824, under the hands and seals of seven of the commissioners acting in the execution of an act passed in the 43 Geo. 3, for abolishing certain dues called petty customs, anchorage and groundage, and for improving the port of the town of Southampton, for making a convenient dock for the security of ships, for extending the quays and wharfs, and making docks and piers in the harbour there, and for erecting warehouses for the safe custody of goods and merchandise, and for imposing certain duties for the above purposes; and of another act passed in the 50th Geo. 3, for

altering and amending the former act—for securing 100*l.*, together with interest thereon, to Martin Maddison the younger, his executors, &c., upon the credit of the rates and duties granted and made payable by the acts; a certain other assignment, &c., &c.; which securities respectively had been before then duly transferred by Maddison to the plaintiff, according to the *provisions of the said acts, and which securities were then of great [*666 value, to wit, of the value of 800*l.*: whereof the defendant then had notice: and the plaintiff then sold to the defendant the said securities at and for a certain price between them in that behalf agreed upon, to wit, the price of 800*l.*, to be therefore paid by the defendant to the plaintiff: and thereupon, in consideration of the premises, and that the plaintiff, at the request of the defendant, would transfer and deliver the said securities to the defendant, and one R. Wheeler, according to the provisions of the said acts, the defendant promised the plaintiff to pay him 800*l.* for the same, whenever afterwards thereunto requested: averment, that the plaintiff, relying on the promise, did duly transfer and deliver the said securities to the defendant and Wheeler, according to the provisions of the said acts. There was also a count upon an account stated.

The defendant pleaded—first, non assumpsit; secondly, to the first count, that the defendant did not buy nor did the plaintiff sell the said securities *modo et formâ*, concluding to the country; thirdly, to the first count, that the plaintiff did not transfer and deliver the securities to the defendant and Wheeler, *modo et formâ*, concluding to the country; fourthly, fraud and covin, concluding with a verification.

The plaintiff joined issue on the first three pleas, and traversed the fraud and covin.

At the trial before WIGHTMAN, J., at the last spring assizes at Winchester, the following facts appeared:—By the 43 Geo. 3, c. xxi., and 50 Geo. 3, c. clxviii., certain commissioners were authorized to raise money upon the security of the pier dues to be collected under the acts, and to execute bonds, to bear interest not exceeding 5 per cent., and to be transferable; these securities, and any future transfer thereof, to be registered. The commissioners, accordingly, granted several bonds, bearing 5 per cent. interest.

*On the 18th of August, 1824, the commissioners executed to Maddison eight of these bonds for 100*l.* each. These eight bonds, [*667 upon the face of them, purported to bear interest at 5 per cent.; but when Maddison took them, he agreed with the commissioners, in consideration of their undertaking to abate some nuisance, and pay the interest regularly, to accept 4*l.* per cent.; and a memorandum to that effect, signed by Maddison, and attested by the witness who attested the execution of the bonds, was endorsed on each bond. (a) Each bond was endorsed—"Bond for

(a) This memorandum, signed by Maddison, but not sealed, was as follows:—"The within-named Martin Maddison hereby covenants and agrees that he will accept and receive the sum of 2*l.* half-yearly, being at the rate of 4*l.* per cent. per annum, as and for interest on the within-

securing 100*l.* and interest at the rate of 4*l.* per cent." Maddison, who was called as a witness, stated that the *memorandum was written before the bonds were executed*. It appeared by the payments noted on the back of the bonds, that, for the year immediately succeeding their date, Maddison *668] received *interest at 5 per cent., but that afterwards and down to the year 1831, (when he sold the bonds to the plaintiff for 80*l.* each,) 4 per cent. only was received.

In August, 1842, the plaintiff's brother, with the knowledge of the plaintiff, called on one Joseph Clark, a sharebroker at Southampton, and informed him that the plaintiff had some Old-Pier Bonds to dispose of, telling him they were a good security, and paid *five* per cent. interest. It did not appear that the plaintiff authorized, or was even aware of, this representation.

On the 27th of August, Clark wrote to the plaintiff as follows:—

“*Southampton, 8th month, 27th, 1842.*”

“Dr. Keele,—Some time since I understood thou hadst for sale a bond or bonds on the Old Pier of this port; and the reason of my now writing is, that I think I know of a person who would be willing to purchase *at par*, if thou consent to pay the transfer expenses.”

The plaintiff informed Clark, in reply, that he had some bonds of that description, which he was not unwilling to dispose of; but that, with respect to paying the costs of transfer, he did not know the usual practice; and he requested Clark to state, from his own knowledge and experience as an agent, what was the usual practice, and what would be the expense.

On the 31st Clark replied to this—

“There is no fixed practice with regard to who shall pay expenses: it is as buyer and seller can agree, and sometimes falls on one and sometimes on the other. In this instance I have sold two bonds to the gentleman in question, conveyed free of expense to him, at par; and he signified, that, if I could get him 1000*l.* more on the same terms, he might take them: and hearing thou was anxious to sell, occasioned me to write. The expenses *669] on the stamps depend on the bonds: if the 1000*l.* *is in one, the stamp will be 35*s.*; if two or more, 35*s.* each. My commission is one half per cent.”

written bond, and in discharge of the interest within mentioned to be paid; provided the treasurer or treasurers appointed in pursuance of the within-mentioned acts, or his or their bankers in Southampton, do and shall pay such sum of money upon the day the same shall become due, or at any time after the same shall become due, immediately on demand thereof being made by him the said Martin Maddison, or by his executors, administrators, or assigns.”

By the form of conveyance prescribed by the act, the treasurer was to assign to the party advancing the money, a *proportion of the duties*,—subject to a certain priority of payment secured to the corporation of Southampton,—with interest at the rate of — per cent. per annum. to be paid half-yearly.

By the endorsement upon the bonds in question, Maddison stipulated for the half-yearly payments of interest being made on the precise days on which they should fall due, *irrespective of the amount of duties levied*. So that if the duties in any particular half-year only yielded one per cent., the other obligees could claim no more than one per cent., whereas Maddison would be entitled to demand his 2 per cent., or, at least, he would, upon non-payment, appear to be remitted to the original reservation of interest at 2½ per cent.

Clark was told that the plaintiff held eight 100*l.* bonds; and by letter of the 3d of September he inquired when the interest fell due, and was informed that it was payable in February and August.

On the 6th of September he wrote to the plaintiff thus:—

“Dr. Keele,—The gentleman writes me this day that he will take the 800*l.* Old-Pier Bonds upon the terms stated, viz. *at par*, conveyed free of expense to him. Thou wilt therefore please to send them to me immediately, that I may proceed to have them transferred and stamped. This will take three or four days, as they will have to be sent to London to be stamped after the transfer is endorsed. When completed, the amount shall be paid to thy order to any bank here, or to the Hampshire Bank, Newport.”

On the 14th of September, the bonds were handed to Clark. On the 16th, the transfer was duly executed, entered and registered. The money was deposited at a bank in Southampton, to be paid over on receipt of the bonds. When Clark's son took the bonds to the bank, his attention was, for the first time, called to the endorsement reducing the interest to 4 per cent.

Clark immediately sent the plaintiff the following letter:—

“I have only just now discovered an endorsement on the back of the Old-Pier Bonds, whereby the interest is reduced to 4 per cent.; of which I was before not at all aware, concluding, of course, that they bore 5 per cent. as on the face of the bonds: and, as the gentleman who bought them did so under this impression, he will not, of course, take them at the same price at 4 per cent. I therefore wish to know, at thy early convenience, whether thou wilt make him any other offer, or whether they shall be returned.”

*“P. S. I think when thou brought them up I should have been informed of their being endorsed at 4 per cent., as 5 per cent. was fully understood in the price.” [*670]

It appeared that Old-Pier Bonds were known in the market as securities bearing interest at 5 per cent., and not otherwise; that the bonds in question were the only bonds upon which the reduced interest was payable; and that Old-Pier Bonds had been sold for 100*l.* each, and excepting those sold by Maddison to the plaintiff, never for less.

The learned judge left it to the jury to say whether the bargain was for Old-Pier Bonds in the ordinary form and at the ordinary rate of interest or not.

They found that the bargain between Clark, as the defendant's agent, and the plaintiff, was for Old-Pier Bonds of the usual sort, at 5 per cent.; but that the plaintiff intended to sell bonds at 4 per cent.

A verdict was thereupon entered for the defendant on the first three issues, he undertaking to retransfer the shares if the verdict should stand, at the plaintiff's expense; with liberty to the plaintiff to move to enter a verdict for him on the issues found for the defendant, with 800*l.* damages, if the court should think that the plaintiff was entitled to succeed upon those issues.

The fourth plea was abandoned.

Channell, Serjt., accordingly, in Easter term last, (April 17,) obtained a rule nisi to enter a verdict for the plaintiff on the first three issues, with 800*l.* damages. There was no misrepresentation on the plaintiff's part, and as the defendant's agent had ample means of knowing that these bonds bore interest at 4 per cent. only, the rule *caveat emptor* should apply. [TINDAL, C. J. Would not the defendant expect to receive bonds in the usual form?] Secondly, these bonds, notwithstanding the endorsement, were bonds bearing interest at 5 per cent. **Blumerhasset v. Pierson*, 3 Lev. *671] 234; *Thompson v. Brown*, 7 Taunt. 656, 1 J. B. Moore, 358, and Bythewood's Conveyancing (by Jarman), vol. iii., p. 682. [TINDAL, C. J. Would not assumpsit lie upon the endorsement?]

A rule nisi being granted,

Talfourd, Serjt., (with whom was *Ball*,) now showed cause. The defendant never agreed to purchase these bonds. Clark can scarcely be said to have been the agent of the defendant. If agent at all, he was agent for both parties. But he had no authority from the defendant, except to buy Old-Pier Bonds, bearing the usual interest of 5 per cent. The securities, incorrectly called bonds, were issued at 5 per cent. interest, with the exception of the eight originally granted to Maddison; and they were known in the market as instruments bearing 5 per cent. interest. As well from the representation made by the plaintiff's brother, as from the correspondence, it is clear that the defendant, as well as Clark, believed that they were dealing for bonds bearing interest at 5 per cent. The execution of these eight bonds and of the memorandum endorsed thereon, was one entire transaction. An endorsement written at the time of the sealing and delivery of a deed is part of the deed. *Lyburn v. Warrington*, 1 Stark. N. P. C. 162. The question here is, not whether at law there is a liability to pay 5 per cent., but whether in equity the commissioners would be entitled to pay the obligee interest at 4 per cent. *Simpson v. Vaughan*, 2 Atk. 31, Madd. Pr. Ch. 59. Was the purchaser to buy a chancery suit? There was ample consideration for the endorsement in the abatement of the nuisance. [TINDAL, C. J. Perhaps also in the regular payment of *672] *the interest half-yearly.] The real question, however, is, did the defendant mean to buy bonds bearing interest at 4 per cent.? Even if Clark had the most ample opportunity of inspection, was it within his authority to buy bonds at 4 per cent.? The contract is not one to be inferred at law, and a court of equity would not require or authorize payment at 5 per cent.

Gaselee, Serjt., (with whom were *Crowder* and *Kinglake*,) in support of the rule. There is no ground for saying that it was understood between the parties that the bonds bore interest at 5 per cent. The verbal representation made by the plaintiff's brother is immaterial; the construction of the correspondence was not for the jury, but for the court. But the contract was the transfer and registration, which vested the shares in the de-

defendant, to which the correspondence was merely introductory. [CRESSWELL, J. The jury expressly find that the bargain between Clark, as the defendant's agent, and the plaintiff, was for Old-Pier Bonds of the usual sort, at 5 per cent. The finding seems to show that the blunder was on the plaintiff's part.] That is a finding not warranted by the facts. The broker, who was the defendant's agent, and as such prepared the transfer, had the bonds in his possession for two days: he, therefore, had ample opportunity of informing himself of that which was apparent upon the instruments; and the rule *caveat emptor* applies. [TINDAL, C. J. You must first fix him with the character of *emptor*.]

Assuming the bargain to have been for bonds bearing interest at 5 per cent., these are such bonds. The endorsement cannot, in law, change their character. No consideration appears in the endorsement, upon which the commissioners could maintain *assumpsit* against Maddison, as suggested by the court when the rule was moved for.

*TINDAL, C. J. I think that the verdict entered for the defendant ought to stand. The question arises upon a contract by which [673 the defendant agreed to purchase from the plaintiff certain securities, called bonds, although they may not strictly amount to instruments of that description. When the contract was to be completed, the Old-Pier Bonds in which the plaintiff had to sell, turned out to be bonds with a certain memorandum endorsed thereon. It will be material, therefore, to inquire how far the nature of the original instrument was varied by the endorsement. This, in its original state, was in the nature of an annuity secured on the pier dues, which in no event could exceed 5 per cent., but until the 100*l.* was paid off, the bond would be an existing charge upon the docks, &c. The amount of interest might vary each year, according to the fluctuating proceeds of the dues. But it appears that 5 per cent. interest was actually paid upon these securities: and that "Old-Pier Bonds" were generally understood to be, bonds bearing interest at that rate, and that all other Old-Pier Bonds which came into the market, bore interest at that rate. But upon the back of the instrument which forms the subject of the present action, appears an endorsement, bearing even date with the bonds, which was proved to have been written *before* the bonds were executed; and the fair presumption is, that the whole was one transaction. Maddison, to whom these bonds were granted, was content to accept 2*l.* per half-year on each bond, provided such interest were regularly paid. He probably thought it more convenient to have certainty and a smaller amount of interest, than to be placed upon the same footing as the other bond-holders. (a) Subject to that condition, he binds himself not to demand more than 4 per cent. interest. The *plaintiff, who had purchased these eight [674 bonds from Maddison, being desirous of selling them, was applied to by Clark, acting as agent for the defendant, who wanted to invest

(a) Vide *suprà*, 667 (a).

money in securities of that description. What would Clark suppose was offered to him, nothing being said to call his attention to the bargain made by the original holder with the commissioners? Would he not necessarily suppose that he was purchasing bonds, with interest at 5*l.* per cent.? And, accordingly, the jury find that "the bargain between Clark, as Wheeler's agent, and the plaintiff, was for Old-Pier Bonds of the usual sort, at 5 per cent.;" though they add that "the plaintiff only intended to sell bonds at 4 per cent." The plaintiff, therefore, stands absolved from any imputation of fraud.(a) In the absence of fraud, the question is on which side is the preponderance of laches. If the plaintiff's conduct exhibited the greater laches, on him should fall the loss. The plaintiff, at the time he contracted to sell these bonds, knew that they only bore interest at 4 per cent., and he must also have known that the general understanding was that Old-Pier Bonds bore interest at 5 per cent. It appears to me, therefore, that he was guilty of laches in not disclosing the existence of the endorsement, and that this laches on his part avoids the contract. The only pretence for imputing laches to the defendant is, that though his agent Clark had the bonds in his possession, he did not discover the endorsement. There being the general understanding I have before adverted to, I do not see that it was his duty (b) to inspect the documents. It is also to be observed that the negligence *675] imputed to the defendant *could work no injury to the plaintiff; but, on the contrary, the neglect on the part of the plaintiff would be very injurious to the defendant.(c) The conduct of the plaintiff having been such as to lead the defendant fairly to suppose that he was bargaining for bonds bearing interest at 5 per cent., when those which the plaintiff had to sell bore interest only at 4 per cent., I think that the contract has failed through the fault of the plaintiff, and therefore that the verdict must stand.

COLTMAN, J. I am of the same opinion. The bond and the endorsement are to be looked at as one agreement between the commissioners and Maddison. It is true that, at law, a bond cannot be put an end to by a parol contract. But, no doubt, in equity, the obligee would be compelled to content himself with 4 per cent. interest on these bonds. The question is, what was the contract entered into by this defendant; whether the jury were justified in concluding that the bargain was for bonds bearing interest at 5 per cent. It appears to me that, although the contract was made by letters, we must look at all the circumstances, in order to ascertain what the parties were referring to in their contract. On the 27th of August,

(a) The fourth plea was abandoned; *suprà*, 670, *infra*, 675 (a).

(b) If it was his duty, it would only be so for the purpose of protecting the defendant against any fraud on the part of the plaintiff, a duty of the non-performance of which the plaintiff would have no right to complain.

(c) The plaintiff sought to obtain 100*l.*, or twenty-five years' purchase, for that for which he had given 80*l.*, or twenty years' purchase, and of which the market price, estimated with reference to the market price of the ordinary unsecured securities,—which appears to have been always 100*l.*, i. e. twenty years' purchase,—must be taken as continuing to be 80*l.*, there having been no rise or variation in the market price of Old-Pier Bonds.

1842, Clark writes to the plaintiff that he *hears* he has some bonds on the Old-Pier to sell. That refers to a previous conversation with the plaintiff's brother. The bonds were described as Old-Pier Bonds; and bonds of that description were known to bear interest at 5 per cent. There were, undoubtedly, conflicting circumstances; but it was for the jury to [*676] *exercise their discretion upon those circumstances; and we cannot set aside their verdict unless we are satisfied that there was no evidence to justify the conclusion to which they have come. So far am I from thinking so, that I am satisfied that the jury have done right. The production of the bonds was evidence the other way. Clark's getting the transfer registered, after the bonds had been two days in his possession, is a circumstance which was well worthy of consideration; but which did not preclude the defendant from explaining those circumstances, or from saying that the bonds in question are not the bonds for which he bargained.

CRESSWELL, J. I also am of opinion that this rule must be discharged. The question is, whether upon the evidence we find ourselves bound to conclude that the plaintiff was entitled to the verdict upon the first and second issues. It appears to me that he was not. The bonds bargained for were Old-Pier Bonds. No specific bonds were mentioned. The bargaining, therefore, must, upon the evidence, be taken to refer to bonds carrying 5 per cent. interest. The plaintiff's brother spoke of bonds at *five* per cent.; (a) and the correspondence was with reference to the bonds so described. Although, therefore, the plaintiff did not mean to represent that his bonds bore 5 per cent. interest, he gave such a description of them as necessarily led the defendant to believe that they were such bonds. What is there then to bind the defendant? The bonds were not delivered to his agent for the purpose of making the bargain, but in satisfaction of a bargain already made. Without considering whether Clark had power to buy any bonds which did not bear interest at 5 per cent., nothing was *done [*677] by Clark which would amount to an acceptance in satisfaction of the contract.

Then, were these bonds at *five* per cent.? The memorandum, if it was signed before the sealing and delivery of the bonds,—which is probable,—might, within the case of *Burgh v. Preston*, 8 T. R. 483, become part of the bond. It was, at all events, binding in equity.

I am, therefore, of opinion that the defendant was not bound to accept these bonds, and that the verdict is properly entered for him.

Rule discharged.

(a) In stating that the bonds *paid* 5 per cent., (*supra*, 668,) he may have meant that they produced that interest upon the purchase money of 80*l.*; but he would not be so understood by those who had never heard of such *exceptional* bonds.

MEMORANDA.

IN Trinity vacation, *John Hodgson*, of Lincoln's Inn, Esq., *Charles Howard Whitehurst*, of the Middle Temple, Esq., and *William John Alexander*, *Robert Charles Hildyard*, and *James Parker*, of Lincoln's Inn, Esqrs., were respectively appointed her Majesty's Counsel: and

Edward Bellasis, Esq., of the Middle Temple, *John Alexander Kinglake*, Esq., of Lincoln's Inn, and *Charles Chadwicke Jones*, Esq., of the Middle Temple, having received writs issued in the same vacation, pursuant to the 6 G. 4, c. 93, commanding them to take upon themselves the state and dignity of Serjeants-at-Law, appeared before the Lord Chancellor at Lincoln's Inn, and taking the oaths usually administered to persons taking that degree and office, became Serjeants-at-Law, sworn, agreeably to the provisions of that act. They gave rings with the motto, "*Paribus Legibus.*"

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN WHICH JUDGMENT WAS DELIVERED

IN

Trinity Vacation,

IN THE SEVENTH AND EIGHTH YEARS OF THE REIGN OF VICTORIA

JENKYNs v. USBORNE. June 29.

A. of London, had ordered beans of B. and C., of Leghorn, through D., their agent. B. and C. shipped more than the quantity ordered, and drew two bills upon A., one for the quantity ordered, and the other for the residue; and they transmitted those bills to A. through D., with a letter of advice and an endorsed bill of lading for the whole cargo. The beans were shipped in 3932 sacks. A. accepted the bill for the beans ordered, but declined to take the residue, (amounting to 1442½ sacks,) or to accept the bill drawn against them. D. consented to take the residue of the beans, and A. thereupon wrote a letter to him, acknowledging such residue to be his, and enclosed an order to the captain to deliver to the bearer the 1442½ sacks. D. thereupon handed over the bill of lading to A. D. accepted the bill drawn against the residue of the cargo, and paid it at maturity. Before the arrival of the ship, D. sold the residue to E., who accepted a bill for the amount, drawn by B., who happened to be in London, and D. handed to E. A.'s letter and delivery-order. E. afterwards applied to F. for an advance of cash, and handed him over as a security (*inter alia*) such letter and delivery-order; and F. gave his acceptance to E. for the amount of cash required; which acceptance was honoured at maturity. Before E.'s acceptance became due, and before the arrival of the ship, E. stopped payment. When the ship arrived, the portion of the cargo for which A. had accepted the bill was delivered to him.

Held, that D. might exercise the right of stoppage *in transitu* as to the residue.

Held, also, that the delivery-order given by A. was not equivalent to a bill of lading.

Held, also, that E. was not a person intrusted with a delivery-order within the meaning of the 6 G. 4, c. 94, s. 2

THIS was an action of trover for a quantity of beans and sacks, of the alleged value of 700*l*. The defendant pleaded, first, not guilty; secondly, that the *plaintiff was not possessed of the goods mentioned in the [679 declaration.

The cause was tried at Guildhall, at the sittings after Trinity term, 1842, before the Lord Chief Justice, when a verdict was found for the plaintiff for 700*l*. damages, subject to the following case:—

The beans mentioned in the declaration were part of a cargo of beans in sacks, shipped by John & Thomas Lloyd, of Leghorn, in May, 1841, to Hunter & Coventry, merchants in London, per the ship Agnes, Captain Turcan, in consequence of an order, previously given by the latter to the former, through the plaintiff. The shippers transmitted to Messrs. Hunter & Coventry, through the plaintiff, a letter of advice, with a bill of lading for the whole cargo, to the order of the shippers, and endorsed "John & Thomas Lloyd," and an invoice, and also two bills of exchange, both of them bearing date at Leghorn, on the 7th of May, 1841, and drawn by the shippers upon Hunter & Coventry at three months; the one for 539*l.* 9*s.* 1*d.*, and the other for 317*l.* 14*s.* 6*d.*, payable to the order of the drawers, and both specially endorsed by the payees to John Lloyd & Co., of Manchester, *680] which last-mentioned firm consisted of the same *individuals as the firm of John and Thomas Lloyd, of Leghorn.

The following is a copy of the above-mentioned letter of advice:—

"Leghorn, 8th May, 1841.

"Gentlemen,—With reference to our communications through our mutual friend Mr. Jenkyns, we have this pleasure to wait on you with invoice, bill of lading, and copy of charter-party, for a cargo of beans, on your account, per Agnes, Captain Turcan, sailing to-morrow morning; and the same amounts to 857*l.* 3*s.* 7*d.* sterling, which we have valued on you in two points, 539*l.* 9*s.* 1*d.* sterling, and 317*l.* 14*s.* 6*d.* sterling, at three months' date, to our order. The quality of these beans has turned out very good, and clearer than the generality of shipments.

(Signed)

"JOHN and THOMAS LLOYD."

The bills were drawn for the price of the shipment. The shipment exceeded the order of Hunter and Coventry, by the amount of the smaller bill. Soon after the arrival of the letter of advice, bill of lading, invoice, and bills of exchange, in London, the plaintiff, who was the agent in London of the shippers, called upon Hunter & Coventry for their acceptance of the above bills. On that occasion Hunter & Coventry accepted the bill for 539*l.* 9*s.* 1*d.*, which covered the price of the beans ordered by them, but declined to take the remainder of the cargo, and refused to accept the smaller bill; whereupon an arrangement was come to which is explained by a letter, of which the following is a copy:—

"Mr. Jenkyns,

London, 24th May, 1841.

"Sir,—The invoice per Agnes, Turcan, master, from Leghorn, states 3932 sacks of beans, equal to (supposed) 983 quarters; the amount sterling for which bills have been drawn is 857*l.* 3*s.* 7*d.* As you have *681] *withdrawn from this amount 317*l.* 14*s.* 6*d.*, we hereby acknowledge such a proportion of the said cargo of beans per Agnes, according to the said sum of 317*l.* 14*s.* 6*d.*, the which you have accepted, to be yours, and herewith hand you an order to receive the same; and,

should there be a difference in the calculating the sacks as per invoice, then you must bear such proportion.

(Signed)

"HUNTER & COVENTRY."

The order referred to in the letter was enclosed therein; and the following is a copy thereof:—

"Captain Turcan, of the Agnes.

"Sir,—Please deliver to the bearer one thousand four hundred and forty-two three-fourths (1442 $\frac{3}{4}$) sacks of beans, ex Agnes.

(Signed)

"HUNTER and COVENTRY."

The plaintiff accordingly, in pursuance of the said arrangement, accepted the smaller bill, namely, on or about the said 24th day of May, and paid it at maturity to John Lloyd & Co.; whereupon the following receipt was endorsed on the back of the bill by Thomas Lewis, per procuration of John Lloyd & Co., of Manchester, namely, "Received from Mr. Jenkyns, London, the amount of this bill in cash, on account of Messrs. John and Thos. Lloyd, per pro. Jno. Lloyd & Co., Thos. Lewis."

The plaintiff, at the time the said arrangement was come to, handed over the bill of lading to Hunter & Coventry.

The plaintiff afterwards, and about six weeks before the arrival of the vessel in the port of London, sold the beans to J. W. Thomas for the price of 317*l.* 14*s.* 6*d.*, for which Thomas accepted a bill to that amount, payable at the same time as the two former bills.

The bill was sent to Thomas for acceptance, enclosed in a letter, of which the following is a copy:—

*"London, May, 1841.

[*682

"Mr. Thomas,—In forwarding the enclosed for acceptance, I beg to hold you harmless of damage to your beans per Agnes. The quantity, as shown per bill you accept, I promise to deliver you free of damage.

(Signed)

"F. JENKYNs."

The bill enclosed was drawn by John Lloyd,—one of the Leghorn firm,—who was generally resident at Leghorn, but who happened at the time to be in London,—by the style and firm of John Lloyd & Co. The bill was made payable to the order of that firm, and was, at the time it was sent for acceptance, endorsed specially to the plaintiff by the said John Lloyd, under the said style of John Lloyd & Co.

On the 25th of May, the plaintiff forwarded to J. W. Thomas, Hunter & Coventry's said letter of the 24th of May, and their delivery-order for the 1442 $\frac{3}{4}$ sacks of beans before set forth, accompanied by the following letter:—

"I was disappointed not seeing you yesterday. The enclosed documents left for you I now beg to enclose; and as I am anxious to send the bill accepted to Manchester, if I may not have been sufficiently explicit, I now beg to say that I guarantee, on the part of Lloyd & Co. of Leghorn, that your beans be delivered in good order. Please forward the bill accepted to

"London 25th May, 1841.

F. JENKYNs."

Thomas thereupon accepted the bill for the beans, and returned the same to the plaintiff. Thomas, on the 14th of June, applied to the defendant for an advance, and proposed to give him a security for a sum of 1000*l.* two bills of lading of two cargoes of oats, and the before-mentioned delivery-order for the 1442½ sacks of beans. The two cargoes of oats were distinct property, having nothing to do with the question in this cause. The *683] *defendant, on the faith of these securities, gave his acceptance to Thomas for 1000*l.*, and received from Thomas at the same time the letter of the 24th May, signed by Hunter & Coventry, and the delivery-order for the beans, together with the said two bills of lading.

On the same 14th of June, Thomas explained to the defendant that Hunter & Coventry held the bill of lading of the whole cargo of beans by the Agnes, and stated that he, Thomas, had been informed by the plaintiff that it was all shipped, and the bill of lading made out, to Hunter & Coventry, therefore it was impossible that he, Thomas, could have the bill of lading, which was held by the owner of the larger part of the cargo. The bill for 1000*l.* was duly paid by the defendant at maturity. The net proceeds of the two cargoes of oats and of the 1442½ sacks of beans, amount to 739*l.* 1*s.* 1*d.*, which, being deducted from the sum of 1000*l.*, the amount of the bill, leaves 260*l.* 18*s.* 11*d.*, to which extent the defendant was uncovered by his securities.

Before Thomas's acceptance became due, and before the arrival of the said ship as hereinafter mentioned, namely, on the 1st of July, 1841, Thomas stopped payment. A fiat issued against him on the 5th of July, 1841; and his before-mentioned acceptance was never paid. The vessel arrived in the river about the 2d of July, and upon that day, and whilst the cargo of beans remained on board the vessel, the plaintiff addressed, and delivered, to Captain Turcan a letter, of which the following is a copy:—

“*London, 2d July, 1841.*

“Captain Turcan,—As soon as you arrive, I should wish to see you. My office is, 3 Love Lane, Eastcheap. There is a parcel of beans on board, in dispute. Should you receive an order to deliver the same from Messrs. Hunter & Coventry, by no means do so. You of course consign your vessel to me, as instructed at Leghorn.

F. JENKYNs.”

*684] *And on the same day, the plaintiff addressed and sent to Hunter & Coventry a letter, of which the following is a copy:—

“*3 Love Lane, July 2, 1841.*

“Messrs. Hunter & Coventry,—The portion of beans, which I hold, according to your letter of the 24th ultimo, on board the Agnes, Captain Turcan, forming part of 3001 sacks, I beg you will not allow to be taken away by any parties without further instructions from me.

“F. JENKYNs.”

Upon arrival of the ship in London on the 16th of July, 1841, that portion of the cargo which belonged to Hunter & Coventry was delivered to them; but the captain refusing to deliver to the plaintiff the remaining por-

tion of the beans, the plaintiff, whilst the beans remained on board the vessel, namely, on the 18th of July, made a formal demand of the same to the captain, and at the same time tendered to him the freight and charges due in respect to them; and the plaintiff also, on the 23d of July, addressed and sent another letter to Captain Turcan, of which the following is a copy:

“23d July, 1841.

“Captain Turcan,—By these presents, I beg to say, that, in refusing to give up the beans to an order dated 24th May, which is now presented by Mr. Hoborne, for 1442 $\frac{1}{4}$ sacks, I beg most distinctly, as the lawful owner of such beans, to hold you harmless from any protest, penalty, or lawsuit therefore occasioned.

F. JENKYNs.”

Captain Turcan, notwithstanding, refused to deliver the beans to the plaintiff, stating at the same time that he held an indemnity from the defendant, to whom, namely, on the 3d of August, 1841, he delivered the *same. Hunter & Coventry having previously, and after the receipt of their own portion of the cargo, endorsed on the bill of lading the following memorandum, namely, “The remainder are to be delivered to the holder of an order for 1442 $\frac{1}{4}$ sacks of beans, signed by us, and dated London, 1841. (Signed) HUNTER & COVENTRY.” [*685]

This endorsement was made on the 30th of July, 1841.

The beans were subsequently, and before the commencement of this action, namely, on the 9th of August, 1841, demanded of the defendant by the plaintiff.

On the 16th July, 1841, John & Thomas Lloyd, of Leghorn, addressed and sent to the plaintiff a letter, of which the following is a copy:—

“Leghorn, 16th July, 1841.

“Mr. F. Jenkyns,—We were duly favoured with your esteemed letter of the 2d instant, announcing the stoppage of Mr. Thomas, and this morning we have the same displeasing news through our Manchester house. We truly sympathize with you for your loss on this occasion; and as to mentioning to Mr. S., or to Messrs. K. and A., that you are our guarantee, you may rest assured we shall not.

J. & T. LLOYD.”

The defendant claimed the beans in question by reason of the before-mentioned pledge to him by the said J. W. Thomas after he purchased the beans of the plaintiff as above mentioned, and before the arrival of the ship Agnes, at London, namely, on the said 14th of June, 1841, and by reason of his the defendant's advance of 1000*l.* to the said J. W. Thomas upon the security of the two bills of lading relating to two cargoes of oats, and the above-mentioned delivery-order and letter of Hunter & Coventry so delivered by the plaintiff to the said J. W. Thomas, and by the said J. W. *Thomas to the defendant, and which last-mentioned bills of lading, delivery-order, and letter the said J. W. Thomas delivered to the defendant at the time he procured the advance. [*686]

If the court are of opinion that the plaintiff was entitled to maintain the

action, the verdict is to stand for 320*l.* 11*s.* 9*d.*, the damages agreed upon between the parties, otherwise a verdict is to be entered for the defendant. (a)

The case was argued the last term. (b)

Shee, Serjt., (with whom was *Addison*,) for the plaintiff. The property in the beans, which are the subject-matter of the present action, never vested in Hunter & Coventry. J. & T. Lloyd, the shippers, clearly never intended the property so to vest until Hunter & Coventry accepted the bills of exchange transmitted with the bill of lading; and they declined to accept the bill drawn in respect of the beans in question, which they had not ordered. Even if they had ordered the whole quantity sent, they would have not *687] had the right of possession till they had accepted the bills. *With respect to that portion of the beans which they had not ordered or accepted, they stood in the same position as, in *Brandt v. Boulby*, 2 B. & Ad. 932, one Berkeley stood in respect to certain wheat. In that case, Berkeley, a merchant in England, in June and July, 1830, sent orders for the purchase of corn to the plaintiffs, in Russia, desiring them to draw upon Harris & Co., in London, for the amount; and he chartered a ship belonging to the defendants, and sent it to Russia to be freighted. On the 28th of July, Berkeley wrote a letter, cancelling the orders he had given. Upon the 8th of August, 1830, the plaintiffs informed Berkeley that they had purchased a cargo for the ship, and should despatch it as soon as possible, addressed to Harris & Co., London, expressing a hope that he would approve of what they had done, notwithstanding his last-mentioned communication. The cargo was afterwards shipped, and the plaintiffs, by letter, informed Berkeley, that they had shipped it on his account, and that they had forwarded an *endorsed* bill of lading to Harris & Co., drawing upon them for part of the price, and upon him, Berkeley, for the residue; and they enclosed an *unendorsed* bill of lading to Berkeley and an invoice of the wheat, in which it was stated to be bought for his order and on his account. The bills of exchange enclosed in his letter were dishonoured, whereupon the plaintiff's agent in London delivered the endorsed bill of lading to Harris & Co. On the 2d of October, Berkeley confirmed the revocation of his order, and on the 24th of November, the agent of the plaintiffs in England gave notice to the agent of Berkeley, that he should retain the whole of the wheat *688] for the plaintiffs. Berkeley afterwards became desirous of having the wheat; and the master of the vessel in which the wheat was *shipped,

(a) The points marked for argument were as follows:—For the plaintiff—"The plaintiff will contend that he was the purchaser of the beans in question from or through Hunter & Coventry, and that he afterwards sold them to Thomas, who, having become insolvent before the transit of the beans was at an end, he, the plaintiff, had a right to stop them *in transitu*: and that having so done, and the defendant having nevertheless obtained them from the captain of the vessel, against the will of the plaintiff, he, the defendant, is liable to this action at the suit of the plaintiff."

For the defendant—"The defendant will contend, on the argument of this case, first, that there was not, under the circumstances therein detailed, any conversion by the defendant of the goods in question; secondly, that, even assuming such a conversion to be proved, the plaintiff had not, at the time of the action brought, such a possession of such goods, or such a right thereto, as would enable him to maintain an action of trover."

(b) 7th June. Before Tindal, C. J., and Coltman, J.

delivered it to Berkeley's orders and not to Harris & Co., pursuant to the bill of lading. In an action brought against the ship-owners for not delivering pursuant to the plaintiff's orders, it was contended, that the plaintiffs were entitled to recover nominal damages only, because the property in the wheat had actually vested in Berkeley by the shipment; but the court held, however, that the property did not vest in Berkeley absolutely upon the shipment, but only subject to a condition, that the bills were accepted, and that, in default of acceptance, it never did vest in him; and, consequently, that the plaintiffs were entitled to recover the value of the wheat at the time when it was delivered to Berkeley's order. The observations of Lord TENTERDEN, C. J., in that case are very applicable to the present. Hunter & Coventry, it is true, did not give an order for the whole shipment; otherwise, their position would be precisely the same with that of Berkeley in the case cited. But they must be taken to have entered into a contract to accept bills for the whole, without which the property in the whole was not to vest in them. A mere shipment of goods will not transfer the property to the consignee; much less will it transfer the right of possession. *Mitchell v. Ede*, 11 A. & E. 888, 3 P. & D. 513. There are cases somewhat resembling the present, but which are distinguishable in a material point; as where goods are shipped and consigned to a party to indemnify him against his acceptances, or as a security for antecedent advances. In such cases the shipment vests an irrevocable property in the consignee; *Haille v. Smith*, 1 B. & P. 563; *Anderson v. Clark*, 2 Bingh. 20; *Bryans v. Nix*, 4 M. & W. 775; *Evans v. Nichol*, 4 Scott, N. R. 43. Here, there was no original order from Hunter & Coventry as to the *beans in question; there had been no acceptances, no advances by [689 them. As soon, therefore, as they declined to accept the beans, the property reverted in the shippers; or, rather, it was never out of them, though the assignees had the option of vesting it in themselves. Hunter & Coventry therefore having no property in the goods, could convey none to another party. The situation of the goods was the same as if they had been sent to London without any specific consignment. In this state of things, the plaintiff takes to the beans in question, and accepts the bill drawn against them. The whole transaction amounted to a sale by the Leghorn house to a party who was usually their agent, but whom, in this case, they acknowledged as their vendee. The property and the right of possession had therefore clearly passed to him. If a bill of lading endorsed by the plaintiff to Thomas had been assigned by the latter to the defendant for a valuable consideration, without fraud or notice that it was not assignable, it may be conceded that the property would have vested in the defendant. But if there was any thing calculated to raise suspicion in the defendant's mind, the mere possession of the bill of lading would have amounted to nothing. It must be contended on the other side, that the handing over by the plaintiff to Thomas of the delivery-order from Hunter & Coventry, and their letter of the 25th of May, 1841, had the same effect as a bill of lading

regularly endorsed has to transfer property at sea, so as to prevent the right of stoppage *in transitu*. But that letter is a mere acknowledgment on their part, that no more of the goods belonged to them than the amount for which they had accepted the bill. Though they had no right to dispose of the remainder, they continued the holders of the *indicia* of the whole of the property; and if they had endorsed the bill of lading for the whole cargo, *690] they might *probably have transferred the property therein to a party who had no notice that they were not entitled to the whole. But a bill of lading is a known negotiable instrument capable of transferring property, as pointed by Lord LOUGHBOROUGH in the judgment in *Mason v. Lickbarrow*, *in error*, 1 H. Bl. 357. Thomas could not dispose of the residue of the beans, never having had what may be called the title-deeds with respect to them in his possession; they remained with Hunter & Coventry, who could not dispose of them without fraud. The reluctance of the courts to give to any other document a similar effect to that of a bill of lading, is strongly exemplified in *Bryans v. Nix*, 4 M. & W. 775. In *Akerman v. Humphrey*, 1 Carr. & P. 53, it was ruled that a consignee of goods delivering over to a third person the shipping-note of such goods, and a delivery-order on the wharfinger to deliver such goods as soon as they arrived, did not pass the property in them so as to prevent a stoppage *in transitu* by the consignor. That case was recognised in *Tucker v. Humphrey*, 4 Bingh. 516, 1 M. & P. 378. With respect to an invoice sent to a consignee of the goods, the documents in the above cases were of a superior kind to those in the present case, inasmuch as they were in the nature of authorities emanating from persons having title to dispose of the goods. There is another class of cases upon which reliance will probably be placed on the other side, namely, where an order given to bailees of goods upon lands, such as warehousemen, by the person having the power to dispose of them, has been held to pass the property. They are collected in Abbott on Shipping, page 469, 470, 6th edit., but they have no application here. No order can have the effect of transferring goods *at sea*, except a bill of lading. Besides, in this case, something was to pre-
 *691] cede the right to claim *possession of the goods, namely, the separation of the parcels of the beans; one sack even having to be divided into different portions. All this could not be done without the intervention of the plaintiff. In *Harman v. Anderson*, 2 Campb. 243, (one of the cases last referred to,) where the purchaser of goods had lodged an order to deliver them with the wharfinger in whose warehouse they lay, and the latter had transferred them in his books into the name of the purchaser; it was held by the court that the vendor's right of stoppage *in transitu* was gone, and would have been equally gone by the lodgment of the delivery-order, without the transfer in the books; but there no other act on the part of the seller was to precede the delivery of the goods. Suppose, in the present case, some of the sacks had been damaged, the question would have arisen, who was to bear the damage; something, therefore, remained to be

done. Assuming, then, that the vendor possessed the right of stoppage *in transitu*, he has exercised it properly. He has done all in his power to stop the goods. Notice to the party in possession is all that is necessary; *Litt v. Cowley*, 7 Taunt. 169, 2 Marsh. 457, recognised in *Whitehead v. Anderson*, 9 M. & W. 518.

Under the circumstances, the defendant ought to have inquired into the transaction. An irregular document was handed to him which clearly was of a questionable nature. It even showed that a regular bill of lading was in existence. Even in the case of a regular bill of lading, if the assignee thereof knows that the consignee of the cargo is insolvent, he will stand in the same situation as such consignee, and take no property in the goods; *Cuming v. Brown*, 9 East, 506. It will, perhaps, be contended on the other side, that the plaintiff was merely an agent for J. & T. Lloyd; but he had *accepted the beans in question; and they were, in effect, [*692 consigned to him. [TINDAL, C. J. Besides, Thomas claims under him.] And, moreover, even if he were a mere agent, he had a sufficient special property in the goods to entitle him to stop them *in transitu*; *Morrison v. Gray*, 2 Bingh. 260, 9 J. B. Moore, 484.

Byles, Serjt., (with whom was *Ogle*,) for the defendant. It is important to consider the situation of the parties in this transaction. The real plaintiffs in the case are the Messrs. Lloyd, the shippers; and because their right of stoppage *in transitu* is at an end, by reason of the endorsement of the bill of lading, and the determination of the transit, they seek to bring the present action in the name of the plaintiff, who was their general agent. They send their bills of exchange through him to Hunter & Coventry; he takes the acceptance of the latter for one bill only, and hands them over the bill of lading for the whole cargo. It is true the plaintiff accepts the bill of exchange for the residue of the beans, but when they are sold to Thomas, it is John Lloyd, and not the plaintiff, who draws the bill for the amount; and yet John Lloyd, according to the argument on the other side, had, at that time, nothing to do with the transaction. But the Lloyds had previously received bills for the whole cargo from solvent parties. COLTMAN, J. Not so; if your argument is correct that the plaintiff was merely their agent, the bill accepted by him would be a mere nullity.] That would depend upon the state of accounts between him and his principals; and that does not appear in the case. The defendant is entitled to a verdict, unless it be clear that the property was in the plaintiff. [COLTMAN, J. If there was any question as to the accounts, there might be a new trial to ascertain that point.]

*Assuming that the plaintiff was not the agent of the consignees, [*693 but was a purchaser from Hunter & Coventry, the question is, in whom the legal interest vested. The bill of lading was made out to order, and was endorsed in blank. It was accompanied by an invoice of the whole cargo, made out to Hunter & Coventry, and by two bills of exchange, both drawn on them. These documents were sent to the plaintiff as general

agent of the shippers. The arrangement entered into between the plaintiff and Hunter & Coventry shows whose property the beans were. The plaintiff hands over to them the bill of lading for the whole cargo; he accepts one of the two bills, and Hunter & Coventry accept the other. *Prima facie*, the whole of the beans belong to them; and they so deal with them. Had there been a certain number of distinct and marked sacks in respect of which the plaintiff had accepted the bill, the property therein would clearly have passed to him by the delivery-order. But Hunter & Coventry had the legal title to the whole of the beans, consisting of two parcels, and the plaintiff purchased from them a title to the smaller parcel by the delivery-order. By the consent of all parties then concerned, the interest in the whole cargo passed to Hunter & Coventry. [COLTMAN, J. It is possible that no interest passed to them, as the shipment to them was conditional upon their accepting the bills of exchange.] If any condition existed, it was clearly waived by the shippers by their representative taking the acceptance of one bill only from Hunter & Coventry, handing over to them the bill of lading for the whole cargo, and taking from them the delivery-order for the residue. If Thomas is not in a situation to dispute the plaintiff's title, as claiming through them, neither can the plaintiff dispute the title of Hunter & Coventry, after taking the delivery-order from them. It is admitted that something remained to be done; and, therefore, *until
 *694] the amount of the beans had been ascertained, it could not be known how much was to pass to the plaintiff. The present case falls within a numerous class; where there has been a sale of goods, and something remains to be done by the vendor. In such cases, the property does not pass by the contract of sale, though a specific performance of the contract might be enforced. In *Zagury v. Furnell*, 2 Campb. 240, where 289 bales of skins (stated in the contract to contain five dozens in each bale) were sold at 57s. 6d. a dozen; and it was the duty of the seller to count over the skins, and see how many each bale actually contained; but before any enumeration took place, the whole were consumed by fire; it was held that an action could not be maintained against the purchaser for the value of the skins, and that the loss fell entirely upon the seller. So, in *Busk v. Davis*, 2 M. & S. 397, where the plaintiffs sold ten out of eighteen tons of hay, then lying in mats at the defendants' wharf, at so much per ton, to be paid for by the vendee's acceptance at three months, and gave the vendee an order on the defendants (the wharfingers) to deliver ten tons to the vendee or order, which the defendants entered in their books, but the quantity to be delivered was to be ascertained by the wharfingers' weighing it, (the mats being of unequal quantities, so that a portion of a mat might be required,) and an allowance for tare and draft was to be made by the weight: it was held that the sale was not complete to pass the property, those acts not having been done by the wharfingers, nor any delivery made; and that the plaintiffs, upon the insolvency of the vendee, might countermand the delivery.

But assuming that in the present case the property did pass to the plaintiff by the delivery-order; what was there to prevent him from passing the property in the *same method to another party? The delivery-order is made out "to bearer;" it is handed to the plaintiff, who [*695 hands it over, with Hunter & Coventry's letter, to Thomas; and, as the other side must contend, by his agent John Lloyd, draws on Thomas for the amount. The property, therefore, in the goods passed to him. [COLTMAN, J. But, as the plaintiff contends, with a right of resumption on his part.] It is submitted that it passed in the same manner as it would have done by a bill of lading. In *Bryans v. Nix*, the documents had the effect of a bill of lading given to them, because all the parties concerned joined in the transaction. They have done so here. [COLTMAN, J. In that case there was no question as to the right of stoppage *in transitu*.] Here, there is an agreement between the parties which is tantamount to a stipulation that the vendor will abandon his right to stop *in transitu*. In *Akerman v. Humphrey*, the party claiming to exercise that right was no party to the delivery-order; if he had been, he would have been equally bound as the plaintiff is here. In *Tucker v. Humphrey*, there was no delivery-order at all, but merely an invoice. In *re Westzynthius*, 5 B. & Ad. 817, 2 N. & M. 644, 650 (c), (a) is an authority to show that under circumstances like the present, there may be an equitable as well as a legal right to a consignment of goods. If the transaction had been regular in this case, there would have been two bills of lading, the one delivered to Hunter & Coventry, the other to the plaintiff. The parties endeavour to make it as regular as they can under the circumstances; and a delivery-order of the residue of the beans is therefore given by Hunter & Coventry to the plaintiff, instead of a bill of lading, and is intended by all parties to have the same effect.

It is said that the plaintiff is not to be considered as *an agent for [*696 the Messrs. Lloyd in this transaction. But at any rate he was a person intrusted with a delivery-order by Hunter & Coventry, so as to come within the operation of the second section of the factors' act, 6 G. 4, c. 94, and therefore was capable of giving a good title to a *bonâ fide* purchaser, to a purchaser or pawnee.

Sher, Serjt., in reply. Even if the plaintiff is to be considered as the agent for Messrs. Lloyd, still the defendant, as he claims under him, cannot dispute that he has a special property in the goods, as against Hunter & Coventry. The shippers had no right to stop the goods *in transitu*. It is argued, that if the plaintiff was not the agent of the shippers, then he was the purchaser from Hunter & Coventry, and that as something remained to be done in order to ascertain the beans to which he was entitled, no property passed to him; that argument, however, supposes that the smaller parcel of beans had never vested in Hunter & Coventry. But, at any rate, there had been a separation of the beans before the conversion. The argument as to the factors' act assumes that the delivery-order was a

(a) And see *antè*, Vol. II. 812, III. 102, n., 5 Mann. & Ryl. 659, n., 9 M. & W. 405.

negotiable security, and that Hunter & Coventry were the owners of the whole cargo. The only way in which the factors' act could apply, would be by considering that Messrs. Lloyd, the owners, had intrusted the plaintiff with the bill of lading; but the cases of *Close v. Holmes*, 2 Mood. & Rob. 22, and *Phillips v. Huth*, 6 M. & W. 572, show that he could not exchange the bill of lading for another instrument and pledge the latter.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court. This was an action of trover, in which the *plaintiff sought to recover the value of a quantity of beans, under the circumstances stated in the special case.

On the part of the defendant it was contended, that, by the endorsement of the bill of lading by John & Thomas Lloyd to Hunter & Coventry, coupled with the acceptance by Hunter & Coventry of the bill of exchange for 539*l.* 9*s.* 1*d.*, in payment of that part of the cargo which equalled the amount of their order, the property in the whole cargo was transferred to Hunter & Coventry, and that there could be no property in the plaintiff, either as agent of Lloyd & Co., or in his own right. We cannot, however, agree to this position. The delivery of a bill of lading endorsed, as was done in this case, puts it in the power of the endorsee to transfer the property to a *bonâ fide* purchaser for a valuable consideration, and deprives the original owner of any right of stoppage *in transitu*; but, as between the original parties,—the consignor and the consignee,—the question whether the property passed, will depend upon what the real contract was.

If Hunter & Coventry had accepted the two bills of exchange drawn upon them, the property in the whole cargo would have passed to them; but they declined to do so, and entered into an agreement with the plaintiff, the nature of which is to be collected from the letter of the 24th of May, 1841, and the delivery-order made in pursuance thereof. This agreement, as far as the assent of John & Thomas Lloyd was necessary to give it validity, appears to us to have been sufficiently ratified by them; inasmuch as the amount of the bill of exchange accepted by the plaintiff, which was in the hands of Hunter & Coventry at maturity, is shown to have been paid to them by the plaintiff,—a fact which is quite inconsistent with the notion of the plaintiff's having acted merely as their agent, in accepting the bill.

*698] *The effect of this agreement, then, appears to us to have been—that it gave the right to Hunter & Coventry to take possession of, and receive their proportion of, the cargo on the ship's arrival, and to the plaintiff, a right to receive the residue.

It was further contended on behalf of the defendant, that, supposing an interest should be held to have passed to the plaintiff under this agreement, still no particular specific part of the cargo passed to him; and, consequently, that there was no such property in the plaintiff as was necessary to support an action of trover. On the part of the plaintiff it was admitted that, until the division of the cargo between Hunter & Coventry and the

plaintiff, there was no specific appropriation of any part of the cargo to the plaintiff; but it was contended, and we think rightly contended, that on the delivery to Hunter & Coventry, of their share, the property in the residue of the cargo vested in the plaintiff, who might therefore well maintain this action for a subsequent conversion, provided he had the right to stop the goods *in transitu*, and had duly exercised that right.

The general right of an unpaid vendor of goods to stop *in transitu*, notwithstanding the acceptance of bills for the value of the goods, was not and could not be disputed; *Feise v. Wray*, 3 East, 93; but it was objected that it is only the owner of the goods who can exercise that right; and that, in this case, the property in the goods had not vested in the plaintiff at the time of the stoppage, but only an interest in, and right to receive, a certain portion of the cargo, to be afterwards ascertained and appropriated to the parties intended: but we see no sound distinction, with reference to the right of stoppage *in transitu*, between the sale of goods, the property of which is in the vendor, and the sale of an interest which *he has in a contract for the delivery of goods to him; if he may rescind the [*699 contract in the one case for the insolvency of the purchaser, he must, by parity of reason, have a right to rescind it in the other.

But it is further objected that the agreement between the plaintiff and Thomas, coupled with the delivery-order signed by the endorsees of the bill of lading, and the subsequent transfer of the rights of Thomas to the defendant for a valuable consideration, put an end to the right of stoppage *in transitu*: and that such an arrangement was treated as equivalent to an actual assignment of the bill of lading, which, if made to a *bonâ fide* purchaser for value, would have that effect.

The actual holder of an endorsed bill of lading may, undoubtedly, by endorsement convey a greater right than he himself has. It is at variance with the general principles of law that a man should be allowed to transfer to another a right which he has not; but the exception is founded on the nature of the instrument in question, which being like a bill of exchange, a negotiable instrument, for the general convenience of commerce, has been allowed to have an effect at variance with the ordinary principles of law. But this operation of a bill of lading, being derived from its negotiable quality, appears to us to be confined to the case where the person who transfers the right is himself in possession of the bill of lading, so as to be in a situation to transfer the instrument itself, which is the symbol of the property itself. In the present case, Thomas was not in possession of the bill of lading: he had only an order on the captain to deliver the goods on arrival; and when, under the circumstances stated in the case, that order was handed over to the defendant, it appears to us, that, although an interest in the contract passed to the defendant, the interest in the goods did not pass, as it would have done if the transfer had been by assignment *of the bill of lading, but that such interest in the goods was still liable to be [*700

defeated by the insolvency of Thomas and a proper exercise of the right of stoppage *in transitu*.

No case has been found exactly resembling the present ; but the observations of Mr. Justice BURROUGH, in the case of *Akerman v. Humphrey*, 1 Carr. & P. 53, appear to us to be very applicable to the present case. In that case certain goods had been consigned by Dent to Hutchinson ; an invoice had been sent to Hutchinson, (a) and a shipping-note, advertising him that the goods had been shipped for him on board the Durham for Hay's Wharf. Hutchinson handed over the shipping-note to Akerman as a security for money advanced upon it by Akerman, and gave him an order upon the wharfingers to deliver the goods to him on arrival. Hutchinson became insolvent, and the goods were stopped *in transitu*. Mr. Justice BURROUGH said : "I do not think the giving of the shipping-note and the delivery-order to the plaintiff made a change in the property ; and I think the shipping-note does not amount to a bill of lading. A bill of lading is exactly like a bill of exchange, and the property it refers to passes by endorsement of it, but not by delivery without endorsement. (a) I do not think this shipping-note, from the nature of it, is endorsable ; and, here, in point of fact it is not endorsed ; therefore, in my judgment, there is no change of property."

Another objection to the plaintiff's right to recover was slightly glanced at, though apparently but little relied on, namely, that Thomas was a person intrusted with a delivery-order, within the meaning of the second section of the 6 G. 4, c. 94, and so, capable of making a valid pledge. We think there is no ground for this objection ; for the act appears to us intended only
 *701] to apply to persons intrusted with such documents, as factors or agents. Thomas was in possession of the document, in this case, not as the agent of another, but in his own right.

Upon the whole we think, for the reasons we have assigned, that none of the objections which have been urged can be sustained ; and, consequently, our judgment will be for the plaintiff. Judgment for the plaintiff.

(a) But after an endorsement in blank, the property in a bill of exchange passes by delivery.

WEBB v. AUSTIN. June 29.

Particulars of sale described the property as "a shop and a dwelling-house, with rooms and offices over, for many years occupied by a tenant under a twenty-one years' lease, nine of which will be unexpired at Lady-day, 1843, at a rent of 48*l.*, and held by lease for a term of sixty-four years, at a ground-rent of 8*l.* 8*s.*"

By the abstract delivered, it appeared that A., by indenture of the 30th of September, 1817, demised the premises to B. for eighty-nine years less twenty-one days from Michaelmas 1817, with various covenants to be performed by B., his heirs, &c.; that B., on the 25th of March, 1820, mortgaged the premises for the residue of the term, to secure 487*l.* and interest to C.; and that, by indenture of the 2d of April, 1831, B. demised the premises to D. for twenty-one years less eight days, at the rent of 48*l.*, with covenants on the part of D., similar to those of B. in the indenture of September, 1817.

The mortgagees were willing to execute any conveyance that might be requisite for the purpose of making a good title to the purchaser.

Held, that B. was in a situation to make a good title to the premises sold—the lease to D., though originally a lease *by estoppel*, being convertible into a lease *in interest*, by the concurrence of the mortgagees.

ASSUMPSIT for money had and received.

Plea, non assumpsit; upon which issue was joined.

At the trial before TINDAL, C. J., at the sittings in London after last Trinity term, a verdict was, by consent, entered for the plaintiff, damages 79*l.*, with interest thereon from the 21st of March last, subject to the opinion of the court upon the following case :

This action was originally brought against Warlters, Lovejoy & Co., the defendant's auctioneers, on the sale *of the estate hereinafter mentioned, to recover back a sum of 79*l.* which had been paid to them [702 on the defendant's account by way of deposit on the said sale; but by an order of ERSKINE, J., dated the 23d of May, 1843, and made in the cause, on the application of Warlters, Lovejoy & Co., it was ordered that, upon payment of the sum of 79*l.* into court to abide the further order of the court, or of a judge thereof, the vendor Austin be made defendant instead of Warlters, Lovejoy & Co.

On the 21st of March, 1843, the defendant caused to be put up for sale by public auction, by Warlters, Lovejoy & Co., at Garraway's, a certain leasehold estate, consisting of a dwelling-house, farrier's shop, and other premises, situate in Crescent Mews, North, Saint Pancras, Middlesex, under the following particulars and conditions of sale :

"The property comprises a long-established farrier's shop, with forges, &c., and a dwelling with various rooms and offices over, for many years occupied by the present respectable tenant, *under a twenty-one years' lease, nine of which will be unexpired at Lady-day, 1843, at a rent of 48*l.*; the tenant paying the sewer, and all other rates and taxes; and is held by lease for a term of sixty-four years from Michaelmas last (less twenty-one days) at a ground-rent of 8*l.* 8*s.* : improved rent 39*l.* 12*s.**

"The lease is dated 30th September, 1817, granted by James Burton, Esq.; contains covenants that the lessee shall repair and insure premises and keep front thereof in a line, except ornamental breaks not projecting above nine inches, and shall not, without consent, hold any auction on the premises, or place any buildings thereon exceeding ten feet in height above the ground-story floor of the farrier's shop, or carry on certain offensive trades, or permit any improper window or light to be made or struck out; also other covenants usual *under this estate. The premises may be [703 viewed by permission of the tenant, particulars had on the premises, at Garraway's, of Mr. Armstrong, Solicitor, No. 33, Old Jewry, (*where the lease and counterpart of under-lease may be inspected at any time prior to the sale,*) and of the auctioneer, 55, Chancery Lane.

"Conditions of sale:—First. The highest bidder to be declared the purchaser; but if any dispute arise between two or more bidders, the property to be put up again and resold.

"Second. No one to advance less than 5*l.* at each bidding.

"Third. The auction duty to be paid in equal moieties by the vendor and purchaser.

"Fourth. The purchaser to pay down immediately into the hands of the auctioneer, a moiety of the auction duty, and a deposit of 20*l.* per cent. in part of the purchase-money, and sign an agreement for payment of the remainder of the purchase-money on or before the 20th of April next. All outgoings will be cleared to that day; from which time the purchaser shall be entitled to the rents and profits: and should the completion of the purchase be delayed, from any cause whatever, beyond the time specified, the purchaser shall pay interest at the rate of 5*l.* per cent. per annum on the balance of his purchase-money, until the same be wholly paid.

"Fifth. The vendor will, at his own expense, deliver an abstract of title to the purchaser, within five days after the sale; and the title shall be deemed satisfactory unless objections be specified within seven days after such delivery: and, on payment of the remainder of the purchase-money according to the fourth condition, the purchaser shall, at his own expense, have a proper assignment; but the purchaser shall not be at liberty to call for the production of the lessor's title, or to object thereto, or require any *704] proof of title beyond the *production of the original lease and counterpart of under-lease: and the last receipt for rent payable under such lease, shall be deemed and accepted as sufficient evidence that the covenants therein contained have been respectively duly performed to the time of the completion of the purchase: and, should the purchaser raise any objection which the vendor cannot remove, he is to be at liberty to annul the sale on returning the deposit-money without interest or expenses. All certificates, attested or official copies of deeds, wills, or other documents, required to verify the abstract, or otherwise, or the production of any deed other than those in the possession of the vendor, and which may be required by the purchaser, shall be obtained or produced at his own expense.

"Sixth. If through misstatement any error shall be made in this particular, such error shall not vitiate the sale, but the purchaser shall either take, or make, an adequate allowance in proportion to the purchase-money, as the case may happen; such allowance to be ascertained in the usual manner.

"Lastly. If the purchaser neglect or fail to comply with the above conditions, the deposit-money shall be forfeited, and the vendor shall be at full liberty to re-sell the said property by public or private sale, without further notice; and the deficiency (if any) occasioned by such re-sale, together with all expenses attending the same, shall be made good by the defaulter at the present sale, and be recoverable in any of her majesty's courts of law, as and for liquidated damages; and, in case of such failure, it shall not be necessary for the vendor to tender to the purchaser an assignment of the property previously to taking the benefit of this condition."

At this sale the plaintiff was, and was declared to be, the highest bidder *705] for, and the purchaser of, the said *premises at the price of 395*l.*; and he thereupon paid to Warlters, Lovejoy & Co., the sum of 79*l.* sought to be recovered back in this action, as a deposit at the rate of 20*l.*

per cent on the purchase-money, according to the particulars and conditions of sale; and an agreement was thereupon entered into between the plaintiff and Thomas Warlters, one of the said firm of Warlters, Lovejoy & Co., as agent for the defendant; of which agreement the following is a copy:—

“Memorandum: I do hereby acknowledge to have this day bought of Mr. Thomas Warlters, the agent of William Austin, the leasehold estate herein described, at the sum of 395*l.*; and I have paid the sum of 79*l.* as a deposit in part thereof; and I agree to abide by, and conform to, all the conditions of this sale and particulars. Dated, 21st March, 1843.

“(Signed)

WM. WEBB.

“Witness, WM. LOVEJOY.

“As agent of the vendor, I agree to, and confirm, this contract.

“(Signed)

THOMAS WALTERS.

“N. B. I have paid the sum of 6*l.* 1*s.* to the said vendor, being half the auction duty; which I request he will pay to the excise, as my share, according to the conditions. . . .“(Signed) WM. WEBB.”

An abstract of the vendor's title to the premises (a copy of which accompanies, and is to be considered part of, the case) was, within the five days after the sale, delivered to the plaintiff; and within seven days after such delivery, objections to such title were duly specified and delivered to the defendant pursuant to the conditions of sale; and, among them, one in the following words, viz.:—“The under-lease of the 2d April, 1831, being *granted without the concurrence of the mortgagees, is only an equitable one; which is a fatal objection to the title.” [706

The property was put up to sale with the consent of the personal representative of the mortgagee, who would have executed any deed, and done any matter, necessary to assign, convey and grant it to the purchaser, for the residue of the term originally granted by Burton: and, in answer to the above objection, an offer was made on the part of the defendant to procure an assignment of the premises in question to the plaintiff, from Sophia Austin, the widow and administratrix, with the will annexed, and sole representative of G. Austin, the surviving mortgagee, in addition to the assignment to be executed by himself, or any other proper instrument the plaintiff might suggest. The plaintiff, however, conceiving that he was not bound to take the title of the defendant as aforesaid, and that the title was not good, refused to complete his purchase, and requested a return of his deposit; which request not being complied with, this action was brought to recover it back.

The plaintiff contends that the defendant did not comply with the conditions of sale, and was not ready to make a good title to the plaintiff according to the contract.

The defendant contends that he did comply with the conditions of sale, and was ready to make a good title. The defendant also contends, that, as the error (if any) was through misstatement, the sale was not thereby

avoided, but that compensation should have been made, pursuant to the sixth condition.

Either party is to be at liberty to refer to the notices and admissions in the cause.

The question for the opinion of the court is—whether the plaintiff was entitled to recover back the deposit above mentioned; if the court is of opinion that the *plaintiff was so entitled, then the verdict entered *707] for the plaintiff as aforesaid is to stand, and judgment is to be entered up thereupon for the plaintiff, for the amount of 79*l.* and interest as aforesaid, and the sum of 79*l.* paid into court as aforesaid is to be paid over to the plaintiff. But, if the court is of a contrary opinion, a nonsuit is to be entered.

The abstract of the vendor's title was as follows :—

By indenture of lease of the 30th of September, 1817, made between James Burton, of the first part, John Crisfield, of the second part, and W. Austin, [the defendant,] of the third part; it was witnessed, that, for the considerations therein mentioned, Burton, at the request and by the direction of Crisfield, demised unto W. Austin, all that parcel of ground, &c.; together with all ways, &c. (except and reserved the free passage and running of water, &c. :) To hold (except as aforesaid) unto W. Austin, his executors, administrators, and assigns, from Michaelmas day then instant, for the term of eighty-nine years, wanting twenty-one days, at the yearly rent of 8*l.* 8*s.*, without any deduction in respect of sewer-rates or any other taxes, &c., payable quarterly, as therein mentioned: Covenants by W. Austin, for himself, his heirs, &c., to pay the rent and sewer-rate, and all other taxes; and also to contribute a reasonable proportion of expenses of making, renewing, repairing, and cleansing all party and fence-walls, cess-pools, channels, sewers, drains, pipes, water-courses, and other easements, &c.; and also that the front of the said farrier's shop, dwelling-house, and premises, should remain during the term, in a line, excepting ornamental breaks not projecting above nine inches; to repair and keep in substantial repair the premises, and the appurtenances belonging thereto, during the term; and quietly to yield up the same, so repaired, at the end of the *708] term, *together with all marble, and other, chimney-pieces, &c., and all other fixtures which should be affixed to the said premises at any time during the said term: that it should be lawful for Burton, his executors, &c., or his or their agents, at all seasonable times during the last ten years of said term, to enter the premises to take a schedule of the fixtures to be left as aforesaid: that W. Austin, his executors, &c., should insure the premises, and all buildings thereafter to be erected, to the full value of so much thereof as could be damaged by fire, in one of the established public fire-offices of insurance in London or Westminster, and, on request, show receipt for premium; and, as often as premises should be burnt down or damaged by fire, would forthwith reinstate the same under the direction of the surveyor, as well of the original ground-

landlords, their successors or assigns, as of Burton, his executors, &c., and that the money to be received from such insurance office should be expended towards reinstating the same ; and further, that, if the premises should be burnt down or damaged by fire, the rent reserved should not be discontinued : that it should be lawful for the ground-landlords, their successors and assigns, and Burton, his executors, &c., and their agents, at all reasonable times, twice, or oftener, in every year during the said term, to enter the premises to take plans, &c., view the condition thereof, and of all such wants of reparation as upon any such view should be found to leave notice in writing at the demised premises for Austin, his executors, &c., to repair the same within three calendar months, within which space Austin, his executors, &c., would repair, and make good all defects and wants of reparation mentioned in such notice, and all others whatsoever : and also that Austin, his executors, &c., [here several covenants immaterial to the point decided, were *set out :] Proviso [*709 for re-entry on non-payment of rent and non-performance of covenants : covenant by Burton, for himself, his heirs, &c., for quiet enjoyment.

By indenture of mortgage, by way of assignment, of the 25th of March, 1820, made between W. Austin of the one part, and Scott and George Austin, of the other part ; reciting the hereinbefore-abstracted indenture of lease of the 30th of September, 1817 ; and reciting an indenture of under-lease (since expired) ; and reciting that W. Austin had occasion to borrow 487*l.*, which Scott and George Austin agreed to advance, at interest, at the rate thereafter mentioned, upon the security of the said leasehold premises—it was witnessed, that, in consideration of 487*l.*, W. Austin did grant and assign unto Scott and George Austin, all that parcel of ground, farrier's shop, dwelling-house, and premises comprised in the indenture of lease of the 30th of September, 1817 ; to hold unto Scott and George Austin, their executors, &c., for all the residue of the said term of eighty-nine years, wanting twenty-one days, subject, nevertheless, to the payment of the rent by the said indenture of lease reserved, and to the performance of the covenants and agreements therein contained, and which, from the day of the date of the now abstracting indenture, on the lessee's part, were and ought to be paid, performed, fulfilled, and kept, in respect of said premises : proviso, that, if W. Austin, his executors, &c., should pay or cause to be paid unto Scott and George Austin, their executors, &c., the full sum of 24*l.* 7*s.* by four equal quarterly payments, at the times therein mentioned, in each year during the life of Jane Austin, mother of W. Austin, (being interest at the rate of 5*l.* per cent. per annum on the said 487*l.*.) the first payment thereof to be made on the 24th of June then next ensuing, and also a proportionable part of the said 24*l.* 7*s.* for such time as should elapse between the days of payment as *should next and immediately precede the decease of Jane Austin and the day of her decease, such proportionable part to be paid [*710

immediately after her decease, and also should pay, or cause to be paid, unto Scott and George Austin, their executors, &c., 487*l.*, six months after the decease of Jane Austin, with interest at the rate aforesaid for the said six months, clear of all deductions; then from and immediately after such last payment, the now-abstracting indenture, and every matter and thing therein contained, should cease, determine, and be utterly void and of none effect. Covenants by W. Austin, to pay the said sums of money at the periods therein limited; that the said indenture of lease was valid in the law; that he had good right to assign, subject to the under-lease therein mentioned, and that the rent and covenants in the indenture of lease had been duly paid and performed up to the date of the now-abstracting indenture; and that W. Austin, his executors, &c., would, until default in payment of the said quarterly payments, or of the said other sums of money, pay, perform, and keep the rents and covenants contained in the indenture of lease: and further, that, after default, it should be lawful for Scott and George Austin to hold and enjoy, and take the rents and profits of the said premises without interruption, &c., subject to the rent and covenants reserved by said first-abstracted indenture of lease: covenant for further assurance: and for quiet enjoyment by W. Austin, his executors, &c., until default in some or one of the payments, or some part thereof, and on payment of rent and performance of covenants in the indenture of lease.

By indenture of under-lease^(a) of the 2d of April, 1831, made between W. Austin, of the one part, and George Gosden of the other part:—it was witnessed, that, for the considerations therein mentioned, W. Austin did *711] *demise unto Gosden, all that the parcel of ground and premises described in the indenture of lease, together with all ways, &c., (except, and reserved, the free passage and running of water, &c.,) to hold, except as aforesaid, unto Gosden, his executors, administrators, and assigns, from the day of the date of the now-abstracting indenture, for the term of twenty-one years, wanting eight days, at the rent of 12*l.*, on the 24th of June then next ensuing, and also at the yearly rent of 48*l.* for the residue of said term, payable quarterly, as therein mentioned. The covenants on the part of Gosden are *similar to those contained in the hereinbefore-mentioned abstracted indenture of lease on the part of W. Austin.* Proviso for re-entry on non-payment of rent and non-performance of covenants. Covenant by W. Austin, to insure, and upon every request of Gosden, his executors, &c., to show the policy of insurance and receipt for premium for the current year; and also during the said term, as often as the premises, or any part thereof, should be burnt down or damaged by fire, forthwith to lay out and expend, under the direction of the surveyor as well of the original ground-landlords, their successors or assigns, as of W. Austin, his executors, &c., such moneys as should be received from the insurance

(a) Or—original lease by estoppel.

company, in making good all such loss or damage ; and, if the said moneys should not be sufficient for re-building the burnt or damaged part of the premises, W. Austin, his executors, &c., should advance and apply such sum as, together with the moneys to be received from the office aforesaid, would be sufficient for substantially re-building the said farrier's shop and premises which might be so burnt down or damaged as aforesaid, as soon as might be, under such direction as aforesaid : covenant for quiet enjoyment.

C. Scott died on the 30th of April, 1832, George Austin died on the 10th of December, 1841, having first *duly published his last will and testament, whereof he appointed his brother Samuel Austin, and W. Haines, executors. Samuel Austin died in the lifetime of George Austin ; and, Haines having renounced probate, letters of administration with the will annexed, were, on the 12th of January, 1842, granted to Sophia Austin, the testator's widow. Jane Austin died in August, 1841.

The case was argued in Easter term last.(a)

* *Channell*, Serjt., (with whom was *Butt*,) for the plaintiff. From this case,—which is scarcely intelligible without referring to the particulars of sale,—and from the accompanying abstract of title, it appears that, after the defendant had become possessed of the term created by the lease of the 30th of September, 1817, and before the granting of the under lease to Gosden of the 22d of April, 1831, viz., on the 25th of March, 1820, the defendant assigned the premises, by way of mortgage, to Scott and G. Austin ; and that the under-lease was made without the concurrence of the mortgagees.

The plaintiff objects, first, that it was matter of bargain between the plaintiff and the defendant, that the former should have the advantages arising

(a) The following points were marked for argument on the part of the plaintiff:—

“ That the defendant did not comply with the conditions of sale, and was not ready to make a good title according to the contract, inasmuch as the purchaser was to have the benefit of an under-lease, whereby the property in question was demised, as alleged by the said contract, to a respectable tenant, for a term of years, nine of which were unexpired at Lady-day, 1843, at a rent of 48*l.* per annum ; whereas the underlease being granted by the vendor alone, after the property had been assigned upon mortgage to secure a certain sum of money advanced to him, he, the vendor, could not assign the reversion so as to give to the purchaser the full benefit of the covenants on the parts of the lessee contained in the under-lease ; because the covenants, being entered into when the legal estate was outstanding as aforesaid, were covenants in gross, and did not run with the land ; and that the concurrence of the mortgagees, if obtained, would not have altered the effect of such covenants.

“ That it was the more necessary that the purchaser should have the full benefit of all such covenants, seeing that there were *similar* special, and other, covenants in the original lease, which it would be incumbent on him to observe as the assignee thereof ; and, if the vendor could make a title, it would only be by way of estoppel ; and the plaintiff contended he ought not to be compelled to take a title depending on estoppel only ; but he submitted that the defendant could not even make a good title to the said under-lease by estoppel, because, although there might be an estoppel as between the original lessor and lessee, there would be none as between an assignee of the lessor and the lessee ; and in that case the lessee would not be estopped from denying that the original lessor had such a title as would enable him to convey to his assignees a right to sue the lessee for any breach of covenant committed by him : and that it made no difference whether the lessor or his assignee, subsequently to the grant of the under-lease, acquired the legal estate in the reversion, since covenants are of a permanent nature, and once operating as covenants in gross, cannot afterwards operate as covenants appendant.”

from the under-lease of the 2d of April, 1831; secondly, that upon the face of the abstract, there is no title to the property sold; thirdly, that the defect is not cured by the offer to procure an assignment from the personal representative of the surviving mortgagee; and fourthly, that the misdescription is such as not to be matter for compensation.

The purchase made by the plaintiff was, not of the fee, but of a leasehold producing annually 39*l.* 12*s.*, secured by an under-lease, with the means of enforcing, against the under-lessee, the covenants of the original lease. He does not contend that the defendant is to be considered as *guaranteeing* that there shall be a yearly *payment* of 39*l.* 12*s.*, during the term; for the under-lessee might become bankrupt, &c. But the purchase is—of property *so under-leased*; and the purchaser had a right to suppose that the under-lease was conceived in terms similar to those of the original lease. The abstract shows, in fact, no under-lease at all. When that which is called an under-lease, was granted, the lessee had no estate out of which he could create such an interest; the lease, consequently, was void; Coote, Landlord and *714] *Tenant, 36. The mortgagees might have treated the under-lease as a nullity; *Brown v. Storey*, ante, Vol. I. p. 117, 1 Scott, N. R. 9. In that case there was acquiescence in the under-lease, on the part of the mortgagees of the original term; but here, nothing of that kind appears. It will be said that the defendant is willing to assign, and that the representative of the surviving mortgagee is willing to assign; but that cannot cure the defect. The plaintiff will still be without his remedy against the under-lessee in respect of any breach of covenant which may be committed. He will not be an assignee of the reversion within the purview of the statute of 32 H. 8, c. 34. (a) *Whitton v. Peacock*, 2 New Cases, 411, 2 Scott, 630, is a case directly in point. There, Maria Littlehales being equitably seised in fee of a copyhold, she and Baker John Littlehales her husband, in 1762, demised a portion thereof *by under-lease* to Keys for ninety-eight years, at the yearly rent of 5*l.*, and by another indenture of the same date, demised other part of the premises to Keys, for the like term and at the like rent. In 1772, B. J. Littlehales acquired the legal fee-simple (b) of the copyhold. In 1773, by indenture between B. J. Littlehales and Maria his wife of the one part, and Keys of the other part, after reciting the two indentures of 1762, and that the parties had come to a further agreement that Keys should have the whole of the copyhold premises at the yearly rent of 10*l.*, but that, instead of cancelling the two several leases already granted of part, they should remain, and another lease be granted of the residue of the property at the ground-rent of 10*l.*, which rent should be considered the same as the two several rents of 5*l.* each so reserved by the leases of 1762, and that *715] notwithstanding such several reservations, not more than *10*l.* per annum in the whole should be payable for the entire premises—the whole of the copyhold premises, except such parts as had already been

(a) As to which see *Thursby v. Plant*, 1 Wms. Saund. 237, 241 (c).

(b) i. e. the customary inheritance, not the freehold, vide post, 719.

demised by the indentures of 1762, were demised to Keys for the same term, Keys covenanting to pay the rent and keep the premises in repair. It was held that the assignee of the reversion could not maintain covenant against the assigns of Keys, for breach of the covenants contained in either of the leases of 1762. In the argument of that case, *Palmer v. Ekins*, 11 Mod. 407, S. C. 2 Lord Raym. 1550, S. C. 2 Stra. 817, (a) where it was held that a lessee by indenture cannot plead, even against an assignee of the lessor, any thing which is tantamount to pleading that the lessor had no interest in the premises when he made the lease,—was much relied on on the part of the plaintiff, but without effect. In *Carvick v. Blugrave*, 1 Bro. & B. 531, 4 J. B. Moore, 303, which was covenant by the assignee of the lessor against the lessee, for non-payment of rent, an allegation in the declaration that the lessor was possessed for the remainder of a term of twenty-two years, commencing on, &c., was held to be material and traversable. DALLAS, C. J., in delivering the judgment of the court in that case, distinguished it from *Palmer v. Ekins*, and said: “If the effect of a plea is, to dispute the interest which a lesser took, under a lease (b) from a lessor, the plea is bad, whatever shape it assumes. The present plea leaves the lease in the same state as the plaintiff has described it; and the defendant merely objects that the title he has alleged as being assigned to him, was not the true title.” Supposing the mortgagees, or the survivor of them, or *his representative, in any way to ratify the under-lease, [*716 how would that put the plaintiff in a situation to sue Gosden for any breaches of covenant, his covenants being merely covenants in gross? No acquiescence on the part of Gosden is shown. [TINDAL, C. J. That, according to the case of *Brown v. Storey*, would only create a tenancy from year to year.] In *Webb v. Russell*, 3 T. R. 393, it was held, that, if mortgagor and mortgagee make a joint demise by indenture, in which the covenants are only with the former and his assigns, although the mortgagee, in whom the legal estate is vested, must be considered as the only party demising, the assignee of the mortgagee cannot maintain an action for the breach of these covenants, because they are collateral to the interest of his assignor in the land, and, therefore, do not run with it.

This is a defect in the title, which is not matter for compensation. In *Flight v. Booth*, 1 New Cases, 370, 1 Scott, 190, it was held, that, where, on a sale by auction of leasehold property, there is in the printed particulars of sale a misdescription in a substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all, the contract is void, notwithstanding a clause providing that “if, through any mistake, the estate should be improperly described, or any error or misstatement be inserted in the particular, such error or misstate

(a) And see *Speake v. Richards*, Hob. 206; *Kemp v. Goodall*, 1 Salk. 277, S. C. 2 Lord Raym. 1154; *Heath v. Vermeden*, 3 Lev. 146, S. C. Lev. Ent. 70.

(b) i. e. by indenture. Vide 4 Nev. & Mann. 29, 6 N. & M. 641, ante, Vol. I. 129, 142 Vol. II. 843, n., Vol. IV. 147, n., 315.

ment should not vitiate the sale thereof, but the vendor or purchaser, as the case might happen, should pay or allow a proportionate value, according to the average of the whole purchase-money, as a compensation either way." TINDAL, C. J., in delivering the judgment of the court, there says: "It is extremely difficult to lay down, from the decided cases, any certain definite rule which

*717] shall *determine what misstatement or misdescription in the particulars shall justify a rescinding of the contract, and what shall be the ground of compensation only. All the cases concur in this, that, where the misstatement is wilful or designed, it amounts to fraud, and such fraud, upon general principles of law, avoids the contract altogether. But, with respect to misstatements which stand clear of fraud, it is impossible to reconcile all the cases: some of them laying it down that no misstatements which originate in carelessness, however gross, shall avoid the contract, but shall form the subject of compensation only; *Duke of Norfolk v. Worthy*, 1 Campb. 337; *Wright v. Wilson*, 1 Mood. & Rob. 207; whilst other cases lay down the rule, that a misdescription in a material point, although occasioned by negligence only, not by fraud, will vitiate the contract of sale; *Jones v. Edney*, 3 Campb. 285; *Waring v. Hoggart*, Ryan & M. 39; *Stewart v. Alliston*, 1 Meriv. 27. In this state of discrepancy between the decided cases, we think it is, at all events, a safe rule to adopt, that, where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed, that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is voided altogether, and the purchaser is not bound to resort to the clause of compensation." Here, the plaintiff bought upon an understanding that for nine years he had an improved rent of 39*l.* 12*s.*, secured by an under-lease the covenants of which he would be in a situation to enforce. In this he was deceived. *Dykes v. Blake*, 4 New Cases, 463, 6 Scott, 320, and *Waring v. Hoggart*, Ryan & M. 39, are in accordance with *Flight v. Booth*.

*718] *Talfourd*, Serjt., (with whom was *Bramwell*,) for the defendant. There are three grounds of objection to the present action. First, the contract was not for the sale of an improved rent; all that was sold was the original lease. Secondly, if it was necessary that there should be a title to the sub-lease,(a) the plaintiff is in a situation to make such a title. Thirdly, supposing the purchaser was, by the terms of the contract, entitled to the existence of a valid sub-lease, any invalidity in the sub-lease would be the subject of compensation or allowance.

The property offered for sale was the term of years created by the lease of the 30th of September, 1817; and not an improved rent or a reversion. The existence of a sub-lease is matter not in advancement of the vendor's title, but is an encumbrance. The statement that the premises "are occupied by a respectable tenant, under a twenty-one years' lease, nine of which

(a) A sub-lease can be made only by a termor, which W. Austin, when he demised to Goden, was not.

will be unexpired at Lady-day, 1843, at a rent per annum of 48*l.*, the tenant paying the sewer, and all other, rates and taxes," is true, notwithstanding that sub-lease may be void as against the mortgagees. [TINDAL, C. J. The defendant does not profess to sell the immediate possession. He is therefore selling a reversion; which imports that there is a valid lease.] If the lease is void, the defendant sold that which was better. [CRESSWELL, J. Do you not profess to give the vendor a title to the improved rent for the nine years?]

It is not true that the lessee could not, without the concurrence of the mortgagees, make a valid under-lease: he has power to assign his reversion in such a manner as that the tenant shall be estopped. The ground upon which the court decided the case of *Whitton v. Peacock* does not appear; but, in *Gouldsworth v. Knights*, 11 M. & W. 337, the court of Exchequer say that the decision may be *supported upon a ground which will not help the argument on the other side. In that case, PARKE, B., speaking of *Whitton v. Peacock*, says: "The substance of the marginal note is, (a) that if a person who has an equitable estate only, demises by deed, and then conveys the reversion, the assignee cannot maintain an action on the covenants in the lease. That is very inaccurate. The point decided was this: a copyholder devised his estate to another, without surrendering to the use of his will. The devisee of the devisee, who, of course, had no estate at all, either legal or equitable, demised part of the copyhold, by deed, and the lessee covenanted to pay rent, and assigned the lease. The heir-at-law of the devisor afterwards surrendered to the use of the second devisee, who afterwards demised another part of the copyhold to the same lessee, and, instead of granting a fresh lease to the lessee, of the part before demised, took a covenant from him to perform the covenants in that lease. The lessor afterwards surrendered the copyhold to another; and the question was, whether the surrenderee could maintain an action on these covenants, against the assignee of the lessee. The court held, most properly, that no such action would lie. No reasons are given; but there is clearly a satisfactory one; for the reversion by estoppel on the first lease was not a *copyhold* transferable by surrender and admittance." [TINDAL, C. J. *Purker v. Manning*, 7 T. R. 537, is rather in your favour. There, it was held, in an action of covenant, for rent on an indenture, brought by the assignees of the lessor, (a bankrupt,) that the lessee could not plead *nil habuit in tenementis*. (b)] In a note to *Walton v. Waterhouse*, 2 Wms. Saund. 418 a, it is said: "Where the grantor or lessor *has nothing* in the lands at the time of the grant or lease—and therefore no interest passes out of him to the grantee or lessee by the grant or lease, *but the title begins by the estoppel which the deed creates between the parties—such estoppel runs with the land, into whose hands soever it comes, whether heir or assignee. As, if a man makes a lease of D. by deed, in which *he has nothing*, and afterwards purchases D. in fee, and suffers it to descend to

(a) 2 New Cases, 411.

(b) Vide 4 N. & M. 29.

his heir, or assigns it to A. in fee, the heir or assignee shall be bound by this estoppel, and so shall the lessee and his assignees; *Trevivan v. Lawrence*, 1 Salk. 276, 6 Mod. 258, 1 Ld. Raym. 729; (a) and this distinction seems to reconcile all the cases." In *Taylor v. Needham*, 2 Taunt. 278, it was held that the estoppel by indenture extends to the assignee of a lease. [TINDAL, C. J. It is a good estoppel as long as the lease lasts. COLTMAN, J. Does the sub-lessee admit any thing more than a sufficient estate in his lessor to make such under-lease?] Gosden is estopped from saying that W. Austin, his lessor, had no interest, though he may show what the nature of his lessor's interest was. The assignee of the lessor by estoppel may distrain. [COLTMAN, J. You must go further, and show that an action of *covenant* would lie.] Suppose W. Austin had assigned the reversion in terms, and Webb, the assignee of that reversion, were to bring an action against the tenant for non-payment of rent or non-performance of the covenants in the lease, the tenant would be estopped from denying the title, by estoppel, of W. Austin, his lessor; *Gouldsworth v. Knights*, 11 M. & W. 337.

If there were any defect in the title to the sub-lease, yet, as there is no fraud, such defect is no ground for rescinding the contract, but is mere matter of compensation, upon the ground that the premises may, for the residue of *721] the nine years, be let for something less than is stated. In **Flight v. Booth*, *Waring v. Hoggart*, and *Dykes v. Blake*, the alteration was too important to be the subject of compensation. [TINDAL, C. J. The plaintiff puts it thus: suppose no sub-lease at all to have been executed; and he says it is the same thing, if he has no power of suing in covenant.] The sub-lease contains a covenant to yield up the premises to the lessor. That covenant could no doubt be enforced. [TINDAL, C. J., to *Channell*. The only point is, whether you can have what you agreed to purchase.]

Channell, Serjt., in reply. The plaintiff could not sue the under-lessee upon the covenants which he entered into with the defendant. *Gouldsworth v. Knights* does not affect the question as to the right of the assignee to sue in covenant. All that the court of Exchequer decided in that case is, that some estoppel existed. The decisions in *Carvick v. Blagrove* and *Whitton v. Peacock* in this court, did not proceed upon the ground suggested in *Gouldsworth v. Knights*. In the latter case there was a plea of not guilty, by statute, so that the defence was good either way. An assignee of the reversion cannot commence his declaration by merely stating the demise; he is bound to bring himself within the 32 H. 8, c. 34, by showing the nature of the lessor's interest. The lease to Gosden is nothing more than a lease by estoppel; and, whether such a lease by estoppel is, or is not valid, it is clear that *covenant* cannot be maintained by the assignee of such a lease; *Noke v. Auder*, Cro. El. 436. (b) *Cur. adv. vult.*

(a) See also *Palmer v. Ekins*, 2 Ld. Raym. 1550, 2 Str. 817, 1 Roll. Abr. 871, (N.) pl. 2, 5; *Raulin's case*, 4 Co. Rep. 54 a, 3 Leon. 203, Co. Litt. 47 b, and 48 a.

(b) The report beginning at p. 373. There, in an action by the assignee of the lease,—not against the lessor, but against the lessee,—who had assigned *by parol*, the true title under which the plaintiff had been evicted was not allowed to be set up against the title by estoppel.

TINDAL, C. J., now delivered the judgment of the court.

*This was an action to recover a deposit paid by the plaintiff as purchaser upon a sale by auction, on the ground that the vendor had not made out a sufficient title. By the particulars of sale the property is described as comprising "a long-established farrier's shop and a dwelling house, with various rooms and offices over, for many years occupied by the present respectable tenant under a twenty-one years' lease, nine of which will be unexpired at Lady-day, 1843, at a rent per annum of 48*l.*, the tenant paying the sewer, and all other, rates, and held by lease for a term of sixty-four years, at a ground-rent per annum of 8*l.* 8*s.*" [**722*]

It appears, by the abstract of title, that James Burton, by indenture of the 30th of September, 1817, demised the premises in question to William Austin, to hold from Michaelmas, 1817, for eighty-nine years wanting twenty-one days, with various covenants to be performed by W. Austin, his heirs, &c.; that W. Austin, on the 25th of March, 1820, granted the premises, by way of mortgage, for securing 487*l.* and interest, to Christopher Scott and George Austin, for all the residue of the said term of eighty-nine years wanting twenty-one days; and that, by indenture of the 2d of April, 1831, W. Austin demised to George Gosden the premises in question, for twenty-one years wanting eight days, at the yearly rent of 48*l.* with covenants on the part of Gosden similar to those entered into by W. Austin in the indenture of the 30th of September, 1817.

As the case states the mortgagees to be willing to execute any conveyance that may be requisite for the purpose, the first, and indeed the only, question necessary to be considered is, whether the mortgagor, with the concurrence of the mortgagees, could make a good title to the purchaser.

On the part of the purchaser it was objected that W. Austin had, by the deed of the 25th of March, 1820, *parted with all his legal interest to the mortgagees, and that a purchaser from him would have no remedy against the lessee or his assignee, for a breach of the covenants of the lease of the 2d of April, 1831: and, in support of this position, the case of *Whitton v. Peacock*, 2 N. C. 411, 2 Scott, 630, was relied upon, as being in point. On the other side, the case of *Gouldsworth v. Knights*, 11 M. & W. 337, was cited, in which it appears to have been held at nisi prius, (and the ruling was afterwards, on consideration, approved of by the court,) that, where a tenant has paid rent to certain persons as his landlords, and they afterwards assign their interest over to other persons, the assigns have a good title, by estoppel, against the tenant, and may distrain for the rent. [**723*]

The case was ultimately decided on a different point; but the opinion expressed by the court is not easily reconcilable with the case of *Whitton v. Peacock*, or with the former case of *Carvick v. Blagrove*, 1 Brod. & Bingham, 531, 4 J. B. Moore, 303; for, if the doctrine laid down in *Gouldsworth v. Knights* is correct, and the tenant in such case is estopped from denying the assignee's right to distrain, the ground of that decision must be, that a tenant is not merely estopped from disputing his landlord's title.

but that he is also estopped from denying that he has a reversion which is capable of being assigned. In the case of *Gouldsworth v. Knights*, the point arose upon a *parol lease*. The present case is much stronger in favour of the title of the vendor,^(a) because here, the question arises on a lease *by indenture*, and the mortgagees are willing to execute any conveyance that may be required; and what we have to consider is, whether, on a conveyance by the mortgagees to the mortgagor, of all their interest, the mortgagor *724] will not have a good title to convey to the *plaintiff. And, on full consideration, it appears to us that he will.

The doctrine on this subject, as it has been generally understood by the profession, may be collected from Mr. Preston's Treatise on Abstracts, vol. ii. p. 210, and the authorities there cited. That general understanding appears to be, that "An indenture of lease, or a fine *sur concessit*, for years, will be an estoppel only during the term. It first operates by way of estoppel, and finally, when the grantor obtains an ownership, it attaches on the seisin and creates an interest, or produces the relation of landlord and tenant; and there is a term *commencing* by estoppel, but *for all purposes* it becomes an estate or interest. It binds the estate of the lessor, &c., and therefore continues in force against the lessor, his heirs, &c. It also binds the assigns of the lessor and of the lessee." In support of those views, reference is made to Bacon's Abridgment, Leases, (O.), which article has been always considered as a work of great authority. It is there said,^(b) "If one makes a lease for years by indenture, of lands wherein he hath nothing at the time of such lease made, and after, purchases those very lands, this shall make good and unavoidable his lease, *as well as if he had been in the actual possession and seisin thereof at the time of such lease made.*" And under the head Leases, (O.), it is afterwards said: "If A. mortgages lands to B. upon condition to re-enter on payment of 10*l.*, and after, A., *725] before the day of payment comes, being in possession, makes *a lease for years, by indenture, to C., and then afterwards performs the condition, this shall make the lease to C. good against himself by estoppel: and it was further adjudged that even the feoffee of A. shall be bound by this lease, which took its effect only at first by estoppel, because he, coming in under one who was estopped, should be himself estopped; which was still a stronger case than the first. And this was adjudged in Ireland, and afterwards affirmed on a writ of error here, and seems a very reasonable judgment; for, if a subsequent purchase will make good a lease of lands by indenture, though the lessor had nothing in those lands at the time of the lease, and therefore his lease at first could only take effect by estoppel, much more in this case, where the lessor had a possibility of coming into the lands again, shall his performance of the condition after, make good the intermediate

(a) *Quare.*

(b) Citing Co. Litt. 47, 327 a; *Smith v. Stapleton*, Plowd. 434; *Rawlyns's case*, 4 Co. Rep. 53; *Sutton's case*, Cro. Eliz. 140; *Sutton v. Dicon*, Savile, 98, 1 Leon. 206, Owen, 98; *Stroud v. Willis*, Cro. EL 362; *Jamies's case*, Sir F. Moore, 181, pl. 288; *Style v. Hearing*, Cro. Jac. 73; *Isham v. Morrice*, Cro. Car. 110, 2 Brownl. 150, 2 Roll. Abr. 871.

lease.(a) And so it should seem, too, if the condition were broken at the time of the lease, so as he had then nothing but an equity of redemption, yet, if he should after be admitted to redeem in Chancery, this would make good the intermediate lease, which took effect at first only by estoppel.”(b) For this is cited *Omelaughland v. Hood*, 1 Roll. Abr. 874.(c)

It may be objected, that, although a lease by *indenture estops the parties to it during the continuance of the lease, the effect of the estoppel continues no longer than during the lease: and this is undoubtedly true when there is but a lease by estoppel: but we are of opinion that this is no longer the case when the lessor afterwards acquires the land itself. In Co. Litt. 47 b, on the passage in the text, “If A. had nothing in the land, and made a lease for years by deed indented, and after purchase the land, the lessor is as well concluded as the lessee to say that the lessor had nothing in the land,” there is a note, from Lord Hale’s MSS., in these terms:—“*Et videtur*, that by purchase of the land, that is turned into a lease in interest which before was purely an estoppel. *Vide tamen* P. 3 Car. C. B., Crook, n. 2. *Isham v. Morris*, Hal. MSS.” The case of *Isham v. Morrice* here referred to,—apparently as one in the doctrine of which the writer did not agree,—is to be found in Cro. Car. 109; and it is there laid down, that, where one makes a lease for years of land by indenture, and hath nothing in the land, and afterwards purchases the land, and aliens it, although it be a good lease for years by estoppel, against him and his alienee, by way of pleading, and shall bind them, yet it shall not bind the jury, but they may find the truth; and, if they find the truth, the court shall adjudge it to be a void lease. This case, however, was before the case of *Omelaughland v. Hood*, the one having been decided in 4 Car. 1, the other in 15 Car. 1: and in *Weale v. Lower*, Pollexfen, 54, Lord Hale and the other judges appear to have adhered to the opinion expressed in the note to Co. Litt. above cited. [*726]

That case, as far as it is material to the present question, was this:—Richard Lower makes a feoffment to the use of himself for life, and, after the death of Richard Lower and Philadelphia his wife, to the use of Thomas Lower for life, after the death of Richard, Philadelphia, and Thomas, to the use of Thomas and the *heirs male of his body, and, for default of such issue, to the use of the heirs of Thomas. Thomas has issue a daughter, and then, by fine and indenture, grants the land to Grills for 500 years. Thomas dies, then Philadelphia dies, Richard being [*727]

(a) It is difficult to see how any doubt could be raised in such a case. A feoffor who enters for condition broken, or upon performance of a condition on his part, *recontinues* his old estate, and may sue for trespasses committed before his entry, as if he had never been out of possession. A lease made before re-entry would, therefore, after the re-entry, be, *as against all the world*, a good lease *by relation*, whether it were made by indenture, by deed-poll, or by parol. In the first of these cases it would be unnecessary, in the other two it would be impossible, to resort to the principle of *estoppel*.

(b) A lease by a party who has only an equity of redemption, is a lease by a *stranger*. If made by *indenture*, it is, at first, a good lease by estoppel, and will become a lease in interest when the lessor acquires the *legal fee*, whether by redemption, or by any other mode.

(c) Translated 10 Vin. Abr. tit. *Estoppel*, (Q.) pl. 10, (U.) pl. 5.

alive: and whether this lease be good after the death of Richard, was the question. Pollexfen argued that the lease was good, and made four questions—first, whether the words “heirs of Thomas” were words of limitation or words of trust—secondly, whether the remainder limited to Thomas and his heirs were a contingent remainder, or a remainder vested in Thomas, which is descended to his heir—thirdly, admitting it were a contingent remainder, and not actually vested in Thomas, yet, whether the same, since the contingency happened, be not vested in the heirs of Thomas, if not strictly, yet in the nature of a descent—fourthly, admitting the remainder be not actually vested in Thomas, but were contingent, and that at the time of the lease made Thomas had no remainder in him, and therefore no estate is conveyed by his deed and fine, yet whether, if Thomas had been alive, it would not have been good against him by estoppel, and so good also against his heir. In arguing the fourth point, Pollexfen says: “It cannot be denied, that, if Thomas had lived after Philadelphia, and the remainder had vested in him, that this, which at the beginning was only good against him by estoppel, would then have been turned into a good estate and term, in interest.” Lord HALE decided, first, that the estate limited to Thomas was a contingent remainder; secondly, that this remainder descended to the heir of Thomas, and he shall have it in course and nature of a descent; thirdly, that the fine of Thomas did operate at the beginning by conclusion, and passed no interest, yet this estoppel shall bind his heir, and he shall be in the same case with his ancestor; fourthly, that the estate which cometh *728] to the heir upon the happening of the contingency, feeds this estoppel, and then the estate by estoppel becometh an estate in interest, and shall be of the same effect as if the contingency had happened before the fine levied. And, in answer to an objection founded on the authority of the case above cited, of *Iseham v. Morrice*,—that an estate by estoppel is not to be favoured, that the jury is not bound to find it, and, if it be found, the court shall judge the lease to be void,—it was answered, that the law is so in cases of obligations, covenants, or personal contracts, which cannot be turned into an *estate*, but, in other cases, where *the estate* is bound by the conclusion, and converted into an interest, although the jury find the matter at large, yet the court shall judge,—according to law,—that the estate is good by reason of the estoppel. And all this was confirmed on a rehearing before Lord Chief Justice HALE, WILD, WINDHAM, and ELLIS, Justices.

It appears to us, therefore, on considering these authorities, that the mortgagor and the representatives of the surviving mortgagee, by concurring together in the manner before stated, can make a good title to the purchaser; and, consequently, we direct a Nonsuit to be entered.(a)

(a) W. Austin not having repaid the 487l. within the six months, the assignment of the term to the mortgagees became absolute. W. Austin having thus become a stranger, acquired (as against Gosden) a *fee-simple* by estoppel by the lease (which could not operate as an *under-lease*) to Gosden by indenture. The covenants by the lessee would descend to, and those b

the lessor would bind, the *heirs* of W. Austin, or of his assignee, and could not be enforced by or against the *personal* representatives, in whom the *term*, upon being redeemed, would vest.

None of the cases cited in the argument show that a reversion by estoppel, which is necessarily an absolute and unqualified *fee-simple*, can be converted into a reversion *for years* in interest.

A., seized of a reversion in fee by estoppel, dies, leaving B. his heir and C. his executor—C. purchases a term in the land from D. The reversion in fee is still in B. by descent.

So, although the term was once in A., who assigned to D.

So, although, after the assignment, an *equitable* interest in the term remained in A., and vested, upon his death, in C.

*LEWIS and Others v. MARSHALL and Another. June 29. [*729

A., a ship-broker, engaged with B., a ship-owner, to have “a full cargo for the ship, the rates of freight for which would average 40s. per ton, and at least nine cabin-passengers, passage-money to average 75l.” The contract was fulfilled as to the cabin-passengers, but the average rate of freight for goods put on board by A. amounted to 32s. only per ton; he shipped on board, however, several *steerage-passengers* for the voyage, the passage-money paid by whom, after deducting the expense of their diet, &c., when added to the freight of the cargo properly so called, made the average earnings of the whole ship, per ton, amount to more than 40s.

Held, that this was not a performance of the stipulations of the contract, “cargo” and “freight” being terms applicable to goods only.

Held, also, that as this was an unusual contract, evidence was not admissible to show that the terms “cargo” and “freight,” used with reference to the voyage on which the ship was engaged, would, by the general usage and course of the trade, be considered to comprise *steerage-passengers* and the net profit arising from their passage-money.

ASSUMPSIT. The first count of the declaration stated, that before and at the time of making the agreement and promise of the defendants therein—after next mentioned, to wit, on the 12th of October, 1842, the plaintiffs were the owners of a certain ship called The Stratheden, which was then about to sail to a certain port beyond the seas, that is to say, to the port of Sydney, in New South Wales, and was, from thenceforward until and at the time of the committing of the breach of promise by the defendants thereafter mentioned, ready to receive each cargo as thereafter mentioned; of all which, the defendants, who were then ship-brokers, carrying on the business of ship-brokers in the city of London, then had notice: and thereupon, on the day and year aforesaid, it was agreed between the plaintiffs and the defendants in manner following, that is to say, the defendants engaged to have a full cargo for the said ship, *the rates of freight* for which would average 40s. per ton, and, at least, nine cabin passengers, the passage-money to average 75l.: the ship was to be despatched not later than the 15th of December: an extra one and a quarter per cent.

*commission to be charged by the defendants for a guarantee: the ship to be consigned inwards on her return to London to the defendant’s advice, the commission being one and a quarter per cent.: in the event of the ship being *fixed* inward by charter-party, the above inward commission not to be charged. Mutual promises. Breach,—after alleging performance by the plaintiffs,—that the defendants did not, nor would, perform their said agreement, or their said promise, but broke their said promise

[*730

and agreement in this, to wit, that they did not, nor would have, or procure, a full cargo for the said ship, the rates of freight for which would, or did, average forty shillings per ton, according to the true intent and meaning of the said agreement, although a reasonable time for so doing had, long before the commencement of the action, to wit, on, &c., aforesaid, elapsed, but therein wholly failed and made default; by means whereof the plaintiffs lost, and were deprived of, divers gains and profits, amounting, in the whole, to a large sum, to wit, 100*l.*, which would have accrued to them for, and in respect of, the freight of such cargo, and which, by reason of the premises, would have arisen and accrued to the plaintiffs if the defendants had performed their said promise and agreement.

The second count,—after stating, as in the first count, that the plaintiffs were owners of The Stratheden, bound to Sydney, of which the defendants, then ship-brokers in London, had notice,—alleged that thereupon, to wit, on, &c., in consideration that the plaintiffs would employ the defendants, for certain reward and commission to them the defendants in that behalf, to act as agents for the said ship, for and during her said voyage, and, in that capacity, amongst other things, to collect the freight which should become payable in England to the plaintiffs, for or in respect of goods shipped on board of the said ship during her said voyage, and to render a true and

*731] accurate account thereof to the plaintiffs, and to pay to the plaintiffs the balance, if any, which should be due to them, after deducting the amount of the reward and commission then due and payable from the plaintiffs to the defendants as such agents, they, the defendants, promised the plaintiffs so to collect the said freight, and so to render such true and accurate account, and so to pay such balance, if any, to the plaintiffs as aforesaid; that the plaintiffs, confiding in the said promise of the defendants, did then employ the defendants, for such reward and commission as in that behalf aforesaid, to act as agents for the said ship for and during her said voyage, and, among other things, to collect the freight which should become payable in England to the plaintiffs for and in respect of goods shipped on board of the said ship during her said voyage, and to render a true and accurate account thereof to the plaintiffs, and to pay over to the plaintiffs the balance, if any, which should be due to them, after deducting the amount of the reward and commission due and payable by and from the plaintiffs to the defendants as such agents: that afterwards, and before the commencement of the action, to wit, on, &c., aforesaid, a large amount of freight, to wit, the sum of 1000*l.*, then was payable in England to the plaintiffs, for and in respect of goods shipped on board of the said ship during her said voyage; but that, after deducting the amount of the said reward and commission due and payable from the plaintiffs to the defendants as such agents as aforesaid, a balance of a certain large amount, to wit, of the amount of 800*l.*, did remain, and was and still is due and payable to the plaintiffs on account of the said freight; of all which the defendants, before the commencement of this suit, to wit, on, &c., aforesaid,

had notice; and although the plaintiffs had always been, and still were, ready and willing to allow the defendants to deduct and retain the amount of their said reward *and commission out of the said freight, yet [*732 that the defendants broke their said promise in this, to wit, that they, the defendants, did not, nor would, collect the said freight so due and payable to the plaintiffs as aforesaid, although a reasonable time for that purpose had, after the same and every part thereof had so become due and payable as aforesaid, and long before the commencement of the action, to wit, on, &c., aforesaid, elapsed, but therein wholly failed and made default: and the defendants further broke their said promise in this, to wit, that they, the defendants, did not, nor would render to the plaintiffs a true or accurate account of the said freight, although the defendants were, before the commencement of the action, to wit, on, &c., aforesaid, requested by the plaintiffs so to do, and although a reasonable time for that purpose had, after the same and every part thereof had so become due and payable as aforesaid, and long before the commencement of the action, elapsed, but therein wholly failed and made default; and the defendants further broke their said promise in this, to wit, that they did not, nor would, although theretofore, to wit, on, &c. aforesaid, requested by the plaintiffs so to do, and although a reasonable time for that purpose had, after the said freight and every part thereof had so become due and payable as aforesaid, and long before the commencement of the action elapsed, pay over to the plaintiffs the balance of the said freight, after deducting the amount of the said reward and commission due and payable to the defendants, but therein wholly failed and made default. And that by means of such breaches of promise, the plaintiffs had been, and were, greatly damnified, and prevented from receiving the same freight, and had lost and been deprived of a large sum of money, to wit, 1000*l.*, which they otherwise would, and ought to, have received, for and in respect of the freight aforesaid.

*There were also counts for money paid, for money had and received, and upon an account stated. [*733

Pleas—first, non assumpsit.

Secondly, to the first count, that the said ship was not ready to receive such cargo as therein in that behalf mentioned, *modo et forma*.

Thirdly, to the same count, that the defendants did have and procure a full cargo, the rates of freight for which would average 40*s.* per ton, according to the true intent and meaning of the said agreement.

Fourthly, to the same count, that, after the making of the promise in that count mentioned, and before any breach thereof, and after divers goods and merchandises had been had and procured by the defendants for part cargo for the said ship, and placed on board thereof, and before the commencement of the action, to wit, on, &c. aforesaid, the plaintiffs exonerated the defendants, by their consent, from their said promise, and wholly released and discharged them from further performance thereof. Verification.

Fifthly, to the second count; that, after the making of the promise in

that count mentioned, and before any breach thereof, and before the commencement of the action, to wit, on the 1st of October, 1842, the plaintiffs exonerated the defendants from their said promise in this behalf, and released and discharged them from the performance thereof. Verification.

Sixthly, to the same count, that after the making of the promise in that count mentioned, and before breach thereof, and before the commencement of the action, to wit, on, &c. aforesaid, the plaintiffs hindered and prevented the defendants from performing their said promise, to wit, by collecting the said freight and passage-money themselves, and by divers other ways and means. Verification.

*734] Seventhly, to the same count, so far as related to the *second alleged breach of promise in that count set forth, that the defendants did render to the plaintiffs a true and accurate account of the said freight.

Eighthly, to the fourth and last counts, except so far as the causes of action in those counts mentioned, related to the sum of 100*l.*, parcel of the moneys in those counts mentioned,—a set-off for work and labour by the defendants as agents for the plaintiffs, and for commission and reward payable to the defendants by the plaintiffs in respect thereof, and for money lent and paid, &c., and upon an account stated.

Ninthly, as to the fourth and last counts, so far as they related to the 100*l.*, parcel, &c., payment of that sum into court, and no damages *ultrà*.

The plaintiffs joined issue upon the first, second, third, and seventh pleas, traversed the fourth, fifth, sixth, and eighth pleas, and took the 100*l.* out of court in satisfaction of the causes of action as to that sum.

At the trial before TINDAL, C. J., at the sittings for London after last Michaelmas term, the following facts appeared:—

A letter containing the contract, as declared upon in the first count, was produced; and it was proved, that as to the cabin passengers, the contract had been performed. It was also proved, that the average freight for *goods* put on board The Stratheden by the defendants, was 32*s.* per ton, and not 40*s.*; but that in addition to the goods so shipped, the defendants had put on board several steerage-passengers for the voyage, who paid 15*l.* per head as passage-money; and that the amount of their passage-money, which was paid in advance (after deducting the expense of their diet during the voyage, and the allowance to be made for the tonnage occupied by them and their stores,) added to the freight of the cargo of goods, would make the average earnings of the ship amount to more than 40*s.* per ton.

*735] *It was contended, on the part of the plaintiffs, that upon this statement of facts, the contract, as to the *cargo*, had not been performed.

On the part of the defendants, parol evidence was tendered that the terms “cargo” and “freight,” in a contract relating to a voyage of this description, by the general usage and course of the trade, would comprise not only *goods*, but also steerage-passengers and the net profit arising from their passage-money. This evidence was objected to on the part of the

plaintiffs. In the first instance it was received by his lordship, upon the ground that the agreement was a mercantile contract; but, as the contract afterwards appeared to be an unusual one, his lordship was ultimately of opinion that the evidence ought not to have been received; and he told the jury that the contract must be construed according to the plain and ordinary meaning of its language, and, that, in his opinion, the legal effect of the contract was, that the defendants undertook to procure a full cargo of *goods* (properly so called) which should average a freight of 40s. per ton; that they had not done this; and that the plaintiffs were therefore entitled to a verdict on the first count.

The jury nevertheless returned a verdict for the defendants on that count.

Sir *T. Wilde*, Serjt., in last Hilary term, obtained a rule nisi for a new trial, upon the ground that the verdict was against the direction of the learned judge and against the evidence.

Shee and Byles, Serjts., in last Easter term, (a) showed cause. (Upon *ERSKINE, J.*, suggesting that his impression was that the case ought to go down for a new trial, but *that before it went, the court ought to say which way the question ought to be left to the jury; it was [736 agreed by the counsel on both sides that the court should finally decide on the admissibility and effect of the evidence; and that if the verdict were entered for the plaintiffs, the amount of the damages should be settled out of court.)

The main question in the case is, whether the Lord Chief Justice was right in his construction of the contract, and in withdrawing it entirely from the consideration of the jury, who, notwithstanding, have found that the defendants have performed their contract to procure freight. If the contract be a mercantile one, as, it is submitted on the part of the defendants, it is, then his lordship's first impression was correct, and evidence should have been admitted of the usage of the trade.

Independently of such evidence, it is by no means clear that the terms "cargo" and "freight" must be taken to apply exclusively to *goods*; nor will the expression "per ton" vary the effect of the rest of the contract. These terms are not used in any definite sense, but may apply to steerage passengers. The word "cargo" may be applied to human beings; as it is common in the African coast trade to speak of a "cargo of slaves." It is true that in that trade they would be considered merely as merchandise; but there would be no objection to speak of a "cargo of convicts," or a "cargo of emigrants." The term merely means *charge*. (b) The word

(a) Before *Tindal, C. J., Coltman, Erskine, and Cresswell, Js.*

(b) The term "cargo" is, by the American writers, considered as applying to "goods" only. *Phillips on Insurance*, 185. It is there said that a policy on "cargo" has been held in Massachusetts not to apply to mules and horses, whether on deck or under deck, the underwriters having no notice that such was the cargo. They are, says Mr. Justice Putman, giving the opinion of the court, "subjects of particular insurance, and not covered under the general word cargo or goods." (Citing *Wolcott v. Eagle*, Jus. Co. 4 Pick. 429.) A similar decision has been given in Maryland. (Citing *Allegre's Administrators v. Maryland*, Jus. Co. 2 Gill. &

*737] "freight" unquestionably includes *money paid by passengers. "The freight of passengers" is spoken of in *Parish v. Crawford*, page 32, 6th edit., (a) as cited in Abbott on Shipping, Part 1, Chap. I. So, in the same work, (Part 4, Chap. VIII.,) it is said, "with respect to living animals, whether men or cattle, which may die during the voyage, without any fault or neglect of the persons belonging to the ship, it is said, that if there be no express agreement whether the *freight* is to be paid for the lading or for the transporting them, freight shall be paid as well for the dead as for the living." (b) And again: (c) "If a pregnant woman be delivered during the voyage, no freight is due for the infant." [CRESSWELL, J. In the same chapter there is a passage which seems to be against you, where it is said, "In this country, it is not unusual to pay for goods shipped for the East and West Indies, at the time of shipment; but this payment, although in common parlance called *freight*, is not, in strictness, properly so denominated, that word denoting the price rather of *actual* carriage, than of receiving goods *to be* carried." Here, the money was paid in advance.] Still, the passages cited show that the words may include a cargo of human beings. So, the term "ton" has not in shipping transactions the same meaning as among landmen, with whom it is used as implying that the subject-matter is to be weighed: *tonnage* is applicable as well to passengers as to horses or cattle.

*738] *But this being a mercantile contract, evidence of usage is properly receivable to explain it. (Upon this point they cited *Robertson v. French*, 4 East, 130, 4 Esp. N. P. C. 246; *Donaldson v. Forster*, Abbott on Shipping, 260, n. (a), 6th edit.; *Vallance v. Dewar*, 1 Campb. 503; *Ougier v. Jennings*, Ib. 505, n.; *Noble v. Kennoway*, 2 Dougl. 510; *Moxon v. Atkins*, 3 Campb. 200; *Robertson v. Clarke*, 1 Bingh. 445, 3 J. B. Moo. 622; *Bottomley v. Forbes*, 5 N. C. 121, 6 Scott, 816, 1 Arn. 481; *Cockburn v. Wright*, 6 N. C. 223, 8 Scott, 469, 8 Dowl. P. C. 260; *Palmer v. Blackburn*, 1 Bingh. 61, 7 J. B. Moo. 339; *Pelly v. The Royal-Exchange Insurance Company*, 1 Burr. 341; *Powell v. Horton*, 2 N. C. 668, 3 Scott, 110; *Backhouse v. Ripley*, Park Ins. 25; *Ross v. Thwaite*, Park Ins. 25; *Da Costa v. Edmonds*, 4 Campb. 142, 2 Chitt. Rep. 227; *Gould v. Oliver*, ante, Vol. II., p. 208, 2 Scott, N. R. 241; *Milward v. Hibbert*, 3 Q. B. 120, 2 G. & D. 142; *Power v. Whitmore*, 4 M. & S. 141; *Simonds v. White*, 2 B. & C. 805, 4 D. & R. 375; *Hutton v. Warren*, 1 M. & W. 466; *Haynes v. Holliday*, 7 Bingh. 587, 5 M. & P. 572; (d) *Hutchinson v.*

Johnson, 136.) In the Dictionnaire de l'Académie, "charge" is usually applied to a ship's burden, whilst *cargaison* (cargo) is defined as "*marchandises qui font la charge d'un vaisseau*." So, in the Diccionario de la Academia Española, *cargazon* (the *cargamento* of the Código de Comercio) is defined as "*la carga de géneros (goods) ó mercaderías (merchandise) que se pone en alguna embarcacion.—Merces in navi vehendæ.*" See also Westcott, *Ins. tit. Goods*.

(a) S. C. shortly reported, 3 Stra. 1251.

(b) 6th edit. 363, citing Dig. 14, 2, 10; *Roccus*, No. 76, 7, 8; *Molloy*, b. 2, ch. 4.

(c) Citing *Roccus*, No. 79; *Molloy*, b. 2, p. 4, s. 8.

(d) And see *Cross v. Eglin*, 2 B. & Ad. 106; *Smith v. Blandy*, Rv. & M. 260; *Hall v. Carr*, 7 Carr & P. 911.

Broker, 5 M. & W. 535; and Smith's notes (1 Smith, L. C. 305) to *Wiglesworth v. Dallison*, 1 Dougl. 201.

The evidence clearly showed a known practice on similar voyages to take steerage passengers instead of goods; with reference to which the parties must be taken to have contracted. [TINDAL, C. J. Your argument would be the same if the guarantee had been silent as to *any* passengers. Undoubtedly. [TINDAL, C. J. On *this sort of cargo there would be no *lien* for the freight.] The plaintiffs at any rate have no equitable right to complain; for it appears they have obtained a more remunerating employment for the ship than if it had been used solely in carrying goods. What was stated at the trial as to the contract being an unusual one, was said with reference to the guarantee from the broker to the owner; it was not meant that the subject-matter of the contract was unusual. [CRESSWELL, J. It would be an important question whether the owner could reject steerage-passengers *as cargo*. In an action against the broker for not supplying a cargo, he might plead a tender of a cargo; would that plea be supported by proof of a tender of steerage-passengers?] That is nearly the same as the present question. The contract may have three constructions; first, that the broker might tender *any* goods; secondly, that he might tender such as were *convenient*; thirdly, that he might tender such only as the owner *liked to take*. The second is probably the true construction. Suppose in this case that no guarantee had been given, or that there had been merely a contract by the broker to do his best to find a cargo, surely parol evidence would have been admissible to explain the meaning of the term "cargo." The construction of a contract, if unusual, is for the court; still, if mercantile or technical words are introduced, parol evidence is admissible to explain them. It was proved to be usual to carry steerage-passengers to Australia. *Some* passengers were clearly contemplated by the contract; steerage-passengers were not expressly mentioned; but as it could not have been intended to exclude them, they were to be taken in addition to the cargo of goods, properly so called.

Sir *T. Wilde*, Serjt., (with whom was *J. W. Smith*), in support of the rule. The plaintiffs do not complain that the defendants have put on board steerage-passengers; *on the contrary, they would have been glad of more, as they were a subject of profit to the plaintiffs. The question is, what did the parties contemplate besides passengers, with reference to the rest of the ship? The contract declared upon in the first count, which is called a guarantee, is, in effect, the whole contract, beyond the general contract,—upon which the second count is founded,—that the defendants would do their general duty as ship-brokers. The complaint is, that the portion of the ship appropriated to cargo, has not been stowed with a sufficient quantity of goods to yield the freight contracted for. The meaning of the terms "cargo" and "freight" is perfectly understood. It cannot be said that the opinion of the Lord Chief Justice at the trial was originally with the defendants. His lordship merely thought that, if it could

be shown there was a particular usage in the trade to explain these terms, they might be so explained by parol evidence. But no such usage was proved. Steerage-passengers are generally in a certain given proportion to cabin-passengers. The contract is to provide "a full cargo," and that means what a ship, or that portion of it which is calculated for cargo, will carry. The defendants profess to have executed the contract by loading something which is not cargo. There is nothing ambiguous in the term cargo; it means merchandise. When a *cargo* of slaves is spoken of, it is—as admitted on the other side—because they are considered as merchandise. Is there any case upon a policy on freight, where "freight" has been held to include passage-money? But, at any rate, the cargo here is to be calculated *by the ton*. [COLTMAN, J. How is tonnage calculated as to living animals, such as sheep or cattle?] It is believed such cases are always specially provided for. When the witnesses spoke of the passage-money *741] as being considered freight, they meant in that term *to include all the earnings of the ship. But, in fact, no usage was proved: nor is this a contract as to which a usage could exist; it is not like a contract made in a particular part of the country, where "a *thousand rabbits*" means 1200. (a) This being an unusual contract, the first step for admitting evidence of usage fails. It is a special contract; which must be taken to be made with reference to the general meaning of the terms employed. In speaking of the construction of the words of a charter-party, Lord TENTERDEN lays down the rule, that although they may receive a liberal construction, yet the construction must not be inconsistent with their plain and obvious meaning. (b) There is no ambiguity in the words of this contract; the defendants seek to raise an ambiguity. [ERSKINE, J. That is the very case in which an ambiguity may be explained; where it is raised by extrinsic evidence.] Here, the attempt to raise an ambiguity fails.

The learned serjeant then proceeded to comment upon, and distinguish, the cases cited on the other side, and concluded by submitting that the basis for admitting parol evidence had not been laid, or that if it had been, there was no evidence of the existence of any usage applicable to the particular contract. *Cur. adv. vult.*

The following judgment of the court was now delivered by

TINDAL, C. J. The question which has been argued before us arises on the issue taken in the third plea, upon an allegation in the first count in the declaration. That count was framed upon a letter of guarantee written by the defendants, the ship-brokers to the plaintiffs, the owners of the ship *Stratheden*, *742] by which letter the defendants engaged with the plaintiffs "to *have a full cargo for the *Stratheden*, the rates of freight for which would average 40s. per ton, and at least nine cabin passengers, passage-money average 75*l*." The breach of contract assigned in the declaration was, "that the defendants did not have and procure a full cargo for the said ship, the rates

(a) Vide *Smith v. Wilson*, 3 B. & Ad. 728, *Smith, L. C.* 728.

(b) *Abbott on Shipping*, p. 260, 6th edit.

of freight for which would average 40s. per ton, according to the true intent and meaning of the agreement;" and the defendants, in their plea, took issue upon this breach, in the terms in which it was framed. At the trial it was proved that the average rate of freight for goods put on board by the brokers amounted to 32s. only per ton, instead of 40s. as specified in the guarantee; but it was also proved, that besides the goods, the brokers had shipped on board several *steerage-passengers* for the voyage, and that the passage-money paid by such *steerage-passengers*, after deducting therefrom the expense of their diet during the voyage, and the allowance to be made for the tonnage occupied by them and their necessary stores, when added to the freight of the cargo, properly so called, made the average earnings of the whole ship per ton amount to more than 40s. And the question at the trial was whether this was a performance of the terms of the guarantee.

The defendants offered parol evidence to prove that the terms "cargo" and "freight," when used in a contract of this description, and with reference to the voyage on which this vessel was engaged, did, by the general usage and course of the trade, not only comprise cargo and freight, in the strict and proper sense of those words as applicable to goods, but comprised also *steerage-passengers* and the net profit arising from their passage-money. The plaintiffs, on the other hand, objected to the admissibility of this evidence, where the terms of the contract were, as they contended, precise, and perfectly free from all ambiguity. I thought, however,* that ⁷⁴³ the case fell within that class of mercantile contracts in which such evidence had been held admissible, and received it accordingly. But, as the evidence appeared to me, after it had been received, to be not admissible, I declined to leave it to the jury as a mean of interpreting the contract, but told them the words of the agreement must be understood in their plain and ordinary meaning, and that the legal effect of the contract was, that the brokers engaged to procure a full cargo of goods, properly so called, which should average a freight of 40s. a ton, which they had not done; and that the jury should, therefore, find their verdict on the first count, for the plaintiffs. The jury, nevertheless, found their verdict upon this count for the defendants; and the case comes before us on a motion for a new trial as upon a verdict against the evidence and the direction of the judge.

Upon showing cause against the rule, it was contended, on the part of the defendants, first, that I ought not to have withdrawn the effect of such evidence from the jury, and taken the construction of the contract upon myself; and secondly, that the evidence given at the trial, proved that the true construction of the contract was that which the defendants had contended for, and as the respective parties have requested the court to substitute themselves for the jury, and to make a final conclusion of the question between them both as to the law and as to the fact, it becomes necessary to decide both questions.

Upon the first point, we take the acknowledged distinction to be this: if

the evidence offered at the trial, by either party, is evidence by law admissible for the determination of the question before a jury, the judge is bound to lay it before them, and to call upon them to decide upon the effect of such evidence ; but, whether such evidence, when offered, is of that character and description* which makes it admissible by law, is a question which is for the determination of the judge alone, and is left solely to his decision.

On the present occasion, the question was, whether there was a recognised practice and usage with reference to the voyage and business, out of which the written contract, the subject-matter of the action, arose, and to which it related, which gave a particular sense to the words employed in it, so that the parties might be supposed to have used these words in such sense.

The character and description of evidence admissible for that purpose is, the fact of a general usage and practice prevailing in the particular trade or business, not the judgment or opinion of the witnesses ; for the contract may be safely and correctly interpreted by reference to the fact of usage ; as it may be presumed that such fact is known to the contracting parties, and that they contract in conformity thereto ; but the judgment or opinion of the witnesses called affords no safe guide for interpretation, as such judgment or opinion is confined to their own knowledge. And, upon referring to the notes of the evidence on the trial, we are inclined to think that the evidence offered fell under the latter character and description, and, upon that ground, that it was properly withdrawn by the judge from the consideration of the jury.

It becomes unnecessary, however, from the course which the cause has taken, that we should arrive at a positive opinion on this point ; for we all agree in thinking that, if the evidence had been submitted to the jury, they ought to have found their verdict for the plaintiffs. The contract itself, as it appears to us, speaks with much plainness and precision. The words "cargo" and "freight" do, *prima facie*, and in their natural and ordinary meaning, refer to *goods* only ; and where, in the same document, occur the words "cabin passengers" and "passage-money," and a contract is made between the same parties as to such latter-mentioned subject-matter, the inference is almost irresistible, that the former words were not intended, within the meaning of the contracting parties, to comprise passengers and passage-money of any description : the parties showing themselves capable of making a contract as to passengers by their proper and specific name. In order, therefore, to vary the ordinary meaning of such plain words, and to make them comprise passengers and passage-money, as well as goods, we think the evidence ought to have been clear, cogent, and irresistible : whereas, at the trial, although two witnesses spoke of the usual course and practice of the trade, the third spoke of his own judgment only ; no instance of such construction is stated by any of the witnesses within their own knowledge ; and the agreement itself is declared not to be according to the usual course of things. The fair inference to be drawn

from their testimony, at the trial, appears to us to be—that it is customary, in calculating the earnings of a ship or making up the account of the earnings, to include money paid for steerage-passengers, but that there is no general usage that, in a contract of this description, such meaning should prevail.

We therefore think, upon this evidence, that instead of a new trial, the verdict which has been found for the defendants upon the first count, should be set aside, on the usual terms, and be entered for the plaintiffs for such sum as shall be ascertained between the parties under the agreement entered into.

Rule accordingly.(a)

(a) In construing a *usual* mercantile contract, the question would seem to be,—in what sense have the terms been used in similar contracts? in the case of an *unusual* contract,—have the terms acquired any, and what, peculiar meaning in general mercantile language, or in the particular trade?

*ANTONIO BONZI and LEWIS BONZI v. PATRICK MAX- [*746
WELL STEWART. *June 29.*

To trover by A. against B., for bales of goods, B. pleaded that C. was the factor of A., and was, as such factor, intrusted by A. with the dock-warrant for the delivery of the bales; that C. applied to B. for an advance of money upon the pledge of the bales; that it was agreed between B. and C. that C. should pledge the bales with B. as a security for the money, which B. agreed to advance to C.; that in pursuance of this agreement, C. delivered the dock-warrants to B., and B. advanced the money, without notice that C. was not the owner of the bales. A. replied, that C. was not intrusted with the dock-warrants; nor did C. agree with B. for the pledging of the bales, *modo et formâ*.

Held, upon special demurrer, that the replication was bad for duplicity, inasmuch as the denial of either of the facts traversed by the replication would have been an answer to the plea.(a) But, after argument, and after the opinion of the court had been pronounced, the plaintiff had leave to amend.

TROVER, for sixteen bales of silk.

The third plea (which is set out at length, *antè*, vol. iv. p. 295) as to four bales of silk, parcel, &c., alleged that Douglas, Anderson & Co., as the factors and agents of the plaintiffs, were intrusted by them with certain dock-warrants for the delivery of these four bales, and applied to the defendant for an advance of money upon the pledge of the said four bales; and that it was agreed between the defendant and Douglas, Anderson & Co., that they should pledge with the defendant the four bales as a security for the money. The plea further alleged the delivery of the dock-warrants, the pledging of the bales, and an advance of money thereupon, and so justified the conversion of the bales to the use of the defendant.

The 4th, 5th, 6th and 7th pleas set up defences of a similar nature, in respect of other bales of silk.

Replication to the 3d plea, that Douglas, Anderson & Co. were not so intrusted with, and in possession of, the dock-warrants in that plea mentioned, or any of them, *nor did they agree with the defendant for the pledge of the four bales of silk, parcel, &c., or any part thereof, [*747 *modo et formâ*; concluding to the country

(a) See the note to *Robinson v. Raley*, 1 Smith, Lea. Ca. 247.

There were similar replications to the 4th, 5th, 6th, and 7th pleas.

Special demurrer to the replication to the 3d plea, assigning for causes, "that the said replication is double, in this, that it attempts to put in issue several distinct and material matters alleged in the plea, that is to say, that Douglas, Anderson & Co. were intrusted with, and in possession of, the dock-warrants in the plea mentioned, and that they agreed with the defendant for the pledge of the four bales of silk as in the plea mentioned; and also for that the plaintiffs ought by their replication to have selected and traversed one material fact stated in the plea only, and not the two facts traversed by the replication." (a)

*748] *There were similar demurrers to the other replications.

The case was argued in last term. (b)

Shée, Serjt., in support of the demurrer. Each of these pleas consists of several distinct and separate material allegations—that Douglas, Anderson & Co. were intrusted as the factors of the plaintiffs with the dock-warrants in question—that Douglas, Anderson & Co. agreed to pledge the dock-warrants with the defendant—that they did so pledge them—and that the defendant had no notice, at the time of the pledge, that they were not the *bonâ fide* holders of these documents. The replications select two of these propositions, the first and second, and traverse them. The replications, therefore, are double. All the dicta to be found in the cases, are subordinate to the general rule as to the singleness of the issue—that is, that every pleading must contain only one answer to the preceding pleading. It will, perhaps, be contended, that, as all the allegations in a plea may be put in issue by the replication *de injuriâ*, where it is admissible, so they may also be put in issue by a cumulative traverse. No doubt, an answer to a previous pleading may consist of one fact, or of several; but if a pleading gives two answers, it is double. The replication *de injuriâ* is an exception to the general rule. The replications in this case contain two distinct answers to the defence set up by the pleas. The principal case relied upon by the other side is *Robinson v. Raley*, 1 Burr. 316, Smith's

(a) The points marked for argument on the part of the plaintiffs were as follows: "The plaintiffs will contend that neither of their several replications demurred to, is bad for duplicity, which appears to be the only objection raised to them; that each of such replications amounts but to a traverse of a connected proposition, advanced by the plea to which it is addressed; that such proposition is, that a valid pledge was made under the factors' act; that, to constitute a valid pledge under the factors' act, there must have been an intrusting with the warrants, a possession of them, and an agreement to pledge, and that the replications involve but a traverse of this connected proposition; that, wherever a number of facts must necessarily exist contemporaneously, and concur towards the establishment of a legal proposition, such proposition, so made up of several facts, may be traversed in a conjunctive form, even though amounting to a mixture of law and fact, according to *Ransford v. Copeland*, 6 Ad. & El. 482, 1 N. & P. 671; *Robinson v. Raley*, 1 Burr. 316; *O'Brien v. Saxon*, 2 B. & C. 908, 4 D. & R. 579; *Inglen v. Marriott*, 2 N. C. 473, 2 Scott, 703; *Pigeon v. Osborn*, 12 Ad. & El. 715, 4 P. & D. 345, 9 Dowl. P. C. 511, and various other cases, which will be referred to in the argument; that each of the replications demurred to is single, and well pleaded in form; that the defendant's proof would be precisely the same under the present form of traverse, as under any traverse suggested by the demurrer; and this, according to decided cases, is one test by which to try the validity of the replication."

(b) *Coram Tindal*, C. J., and Colman, J.

Leading Cases, 240. All the confusion which occurs in the *latter cases has arisen from what appears to have been said by Lord [749] **MANSFIELD, C. J.**, in that case. That was an action of trespass *quare clausum fregit*, and the defendant pleaded a right of common for his commonable cattle, levant and couchant upon the premises; the replication alleged that the cattle were not the defendant's own cattle, levant and couchant upon the premises, and commonable cattle; the replication was demurred to as being multifarious; and it was held not to be so. Lord **MANSFIELD, C. J.**, said, "It is true, you must take issue upon a single point; but it is not necessary that this single point should consist only of a single fact. Here, the point is, the cattle being entitled to common; this is the single point of the defence. But, in fact, they must be both his own cattle, and also levant and couchant; which are two different essential circumstances of their being entitled to common; and both of them absolutely requisite." **DENISON, J.**, added, "Here, the question is, one single proposition, viz., the measure of the common; and the measure of the common is, the levancy and couchancy jointly with the property." The "single point" or "single proposition" there mentioned, does not mean a single defence. There was another fact alleged in that plea, necessary to the defence, which was not traversed, namely, that the defendant had a right to common; if that fact had been traversed, there would have been an answer to the action; but it could not be traversed jointly with the other facts. [**TINDAL, C. J.** I thought that the replication in that case imbodyed a traverse of every thing necessary to make a complete right of common.] There were two "points" of defence there, 1st, that the defendant had a right of common, and 2dly, that the cattle were entitled to common; the replication put in issue the second point only—namely, all the facts necessary to show that the cattle *were entitled to common. In *Bell v. Tuckett*, antè, Vol. III. p. [750] 785, 4 Scott, N. R. 402, 1 Dowl. N. S. 458, **TINDAL, C. J.**, said the question was, whether the several allegations in the plea amounted to more than *one single ground of defence*; for, if so, the plaintiff had a right, by his replication, to put the defendant to the proof of the whole. And **COLTMAN, J.**, added, "The doctrine is clearly established, that where the matter put in issue amounts only to *one defence*, the whole of the facts may be traversed at once." (a) These observations must of course be taken to apply *secundum subjectam materiam*. In *Bennison v. Thelwall*, 7 M. & W. 512, in assumpsit by the endorsee against the acceptor of a bill of exchange drawn by D., the defendant pleaded that the defendant, by D., his agent, paid to the plaintiffs, and they then accepted and received of D., as such agent, a certain sum in full satisfaction of the cause of action: the plaintiffs replied that the defendant, by D., his agent, did not pay to the plaintiffs, nor did they accept or receive of D., as such agent, the said sum in full satisfaction, &c.; and it was held that this replication was good, because the payment and acceptance there constituted *one point* of defence

(a) Vide antè, III. 801 (b).

Webb v. Weatherby, 1 N. C. 502, 1 Scott, 477, was then referred to by PARKE, B., as an authority to show, that where two matters form but *one* defence, both may be included in one traverse. The meaning of "one defence" there clearly is one *point* of defence.^(a) In *Brogden v. Marriott*, 2 N. C. 473, 2 Scott, 703, all the facts stated in the plea constituted but one single defence, namely, that the person obstructing the trotting of the horse was the servant of the plaintiff, and did it by his authority. The same observation applies to **O'Brien v. Saxon*, 2 B. & C. 908, 4 D. & R. *751] 579, and *Pigeon v. Osborn*, 12 A. & E. 715, 4 P. & D. 345, 9 Dowl. P. C. 511. *Ransford v. Copeland*, 6 A. & E. 482, 1 N. & P. 671, only decides that there may be a traverse of an allegation containing a mixed question of law and of fact. The pleading *de injuriâ* has always been considered an anomaly. It was admitted with great reluctance, as a plea in bar in replevin in *Selby v. Bardons*, 3 B. & Ad. 2, and Lord TENTERDEN, C. J., there differed from the rest of the court. The judgment of the King's Bench was, however, affirmed in the Exchequer Chamber,^(b) and TINDAL, C. J., there pointed out that the exception in *Crogate's* case, 8 Co. Rep. 66 b, as to the inadmissibility of the replication *de injuriâ*, where the issue would present multiplicity of matter, did not intend that separate and distinct facts, constituting altogether one defence, might not be included in the general replication. This form of replication was suggested as being applicable to actions of assumpsit, by BAYLEY, J., in *Carr v. Hinchliff*, 4 B. & C. 547, 7 D. & R. 42, and was declared to be so by the court of Exchequer, in *Isaac v. Farrar*, 1 M. & W. 65, Tyrwh. & G. 281, 4 Dowl. P. C. 760, where the true reasons of its application are stated in the judgment of the court delivered by Lord ABINGER, C. B. About the same time a similar decision was come to by this court in *Griffin v. Yates*, 2 N. C. 579, 2 Scott, 845, 4 Dowl. P. C. 647, where a replication, not unlike the present, was held to be double, but the court gave the plaintiff leave to amend by replying *de injuriâ*. In *Purchell v. Saller*, 1 Q. B. 197, 1 G. & D. 682, 9 Dowl. P. C. 517, the replication *de injuriâ* was held admissible in debt *752] upon simple contract.^(c) That decision indeed was *subsequently overruled in the Exchequer Chamber,^(d) upon the ground, that the plea of set-off to which *de injuriâ* was replied, was a plea in *discharge* and *not in excuse*; and that the particular plea there set up an authority derived from the plaintiff, so as to bring the case within the exceptions in *Crogate's* case. So, in this case an authority is, by the plea, derived from the plaintiff; the replication *de injuriâ* could, therefore, not be admissible. But if the court holds that the traverse, as pleaded in the replication, is good, they will enable the plaintiff to do what he could not do by the more general

(a) *Vide post*, 756 (a).

(b) *Bardons v. Selby*, in error, 9 Bingh. 756, 3 Moo. & Sc. 280, 1 C. & M. 500, 3 Tyrwh. 431.

(c) The same court had previously come to a similar decision in assumpsit, in *Watson v. Wilks*, 5 A. & E. 237, 6 N. & M. 752; and *Reynolds v. Blackburn*, 7 A. & E. 161, 2 N. & P. 136, 6 Dowl. P. C. 19.

(d) *Saller v. Purchell*, 1 Q. B. 209, 1 G. & D. 693.

replication *de injuriâ*. The whole object of pleading is to obtain singleness in the issue; and, therefore, no plea or subsequent pleading is to contain several distinct answers to that which preceded it; Steph. Pleading, p. 286, 5th edit. Instances are there given in which traverses have been held bad for duplicity; as in *Humphreys v. Churchman*, Cas. temp. Hardw. 289, where the plaintiff declared in trespass for breaking and entering his stable, cutting asunder a beam, and throwing down the tiles of the roof; the defendant justified as servant to Sir H. G., and pleaded that Sir H. G. was seised of a wall in his demesne as of fee, and because the beam was placed in the wall of the said Sir H. G. without his consent, the defendant as his servant, in order to remove this nuisance, did enter the stable, and cut the beam as near to the wall as he could, doing as little damage as possible, and thereby the tiles were thrown down: the plaintiff replied, traversing that the wall was Sir H. G.'s; and then further pleaded, that the defendant of his own wrong did throw down the tiles, for the cutting the beam as afore-said. And the court *held, that the first traverse being a complete answer to the whole, the second made the replication double. That [753 case is not distinguishable in principle from the present. It shows that the term "point of defence" cannot be considered co-extensive with "defence." If here the traverse had been that Douglas, Anderson & Co. were not intrusted with the dock-warrants, that would have been answer to the whole plea; so, if the plaintiffs had traversed the allegation that Douglas, Anderson & Co. had agreed to pledge the bales of silk with the defendant. [COLTMAN, J. So, it might be said, that in *Robinson v. Raley*, the plaintiff might have limited himself to traverse one fact, which would have been an answer to the plea, such as that the cattle were not the defendant's own, or that they were not commonable cattle levant and couchant. TINDAL, C. J. It is so difficult to apply the rule in such cases. The other side will probably contend that here, the plea sets up various facts, which go to constitute a rightful pledge, and that the replication puts some of these in issue.] The rule is exemplified in Bro. Abr. tit. *Double Plee*, pl. 90.(a) In *Smith v. Dixon*, 7 A. & E. 1, 2 N. & P. 1, 4 Dowl. P. C. 571, the plaintiff declared upon a contract by which the defendant bargained for a certain number of oak-trees, to be well taken up by the plaintiff, *and delivered to the defendant; and the declaration alleged that the plaintiff well [754 and properly took up for the defendant the oak-trees, and was ready to deliver, and tendered, them to him; and a plea that the plaintiff did not well

(a) "Debt upon bond, which was on condition to abide by the award of J. N., so that the same was made and delivered to the parties by such a day; the defendant says that no award was made or delivered before that day; and it is double, *per totam curiam*, for it is a good plea that he made not any award by the day, and it is a good plea that he delivered not the award before the day, (*sed vide* Kitch. 232 b, Com. Dig. *Pleader* (R 6), *contra*,) *et idem*, *quod non deliberavit arbitrium in scripturâ*, &c., where the submission is—to be (that the award should be) delivered in writing." Citing 5 H. 7, (M. 5 H. 7, fo. 7, pl. 14.) In that case the court point out, as one of the inconveniences which would result from allowing such a plea, that the award may be made in one county, and delivered in another. As to which, see 1 Wms. Saund 246 b.

and properly take up for, or tender or offer to deliver to, the defendant the trees, &c., was held bad for duplicity.

It is further suggested in the points marked for argument on the part of the plaintiff, that the proof would be precisely the same under the present traverse, as under any one suggested by the demurrer; but that is not so. If the plaintiffs had traversed the agreement to pledge only, it would not have been necessary to prove that Douglas, Anderson, & Co. were intrusted with the dock-warrants; so, if they had traversed the fact of pledging merely; or, *vice versâ*, if they had traversed the fact of the factors being intrusted with the dock-warrants, it would not have been necessary to prove the agreement to pledge, or the fact of pledging. At present, two distinct points of defence are traversed, each of which is to be proved by different evidence. If one alone had been traversed, the non-traversing of the other would not have amounted to an admission, according to the doctrine laid down by ALDERSON, B., in *Edmunds v. Groves*, 2 M. & W. 642.

Sir T. Wilde, Serjt., *contrâ*. The effect of the plea in question is to set up a special lien under the factor's act: it does not show any authority from the plaintiff to the defendant, or even any authority to Douglas, Anderson, & Co., to pledge the silk; the effect of the statute being, that such a pledge under certain circumstances, although a wrongful act on the

*755] part of the factor, is to be considered valid as against the principal. *The defendant's lien is the single point of defence; but it is constituted of the several facts which are set out in the plea; and the principle is clearly established, that where several facts are necessarily stated in order to constitute one point of defence, all those facts may be traversed. The test as to duplicity is, not whether a traverse of one of several facts would be an answer to the preceding pleading, but whether those several facts are all necessarily alleged in that pleading, either as a single ground of defence in a plea, or as a single matter of answer in any subsequent pleading. Here, if it was necessary for the defendant to allege and prove the several facts contained in this plea, in order to show one single ground of defence, namely, lien, it is competent to the plaintiff to traverse all those facts; although it may be that the traverse of one of them would be an answer to the plea. In *Robinson v. Raley*, the defendant pleaded several facts in order to show a right of common, and it was held that the plaintiff was entitled to traverse all the facts constituting that right, although if he had selected one of these facts to traverse it would equally have been an answer to the defence. In *Roules v. Lusty*, 4 Bingh. 428, 1 Moo. & P. 102, which was a writ of entry *sur abatement*, where the demandant claimed as heir to R. S., the tenant pleaded that R. S. devised the estate to T., who devised it to S., wife of C., and that they, in right of S., levied a fine to the tenant. It was objected that this plea was double, upon the ground that either the devise or the fine furnished a complete defence, but the court held otherwise; and PARK, J., in giving the judgment of the court, thus laid down the rule:—
“First of all, no matter will operate to make a pleading double, that is

only pleaded as a necessary inducement to another allegation. I admit the rule *laid down by Lord C. B. COMYNS, that if a plea contains duplicity, and alleges several distinct matters (which require several [756 and distinct answers) to the same thing, that would be bad. (Com. Dig., tit. *Pleader*, E. 2.)—But no matters, however multifarious, will operate to make a pleading double, provided that all taken together constitute but *one connected proposition or entire point*. * * * The true rule in pleading I take to be this, that duplicity is, where two distinct matters, *not being part of one entire defence*, are attempted to be put in issue. But this can never apply to, nor does it ever preclude a party from, introducing *several matters into a plea, if they are constituent parts of the same defence*. For though it be true that issue must be taken on a single point, yet it is not necessary, nor ever can be, that such single point must consist only of *one single fact*.” And his lordship referred to *Robinson v. Raley*, as an apt illustration of the rule. So, in *Selby v. Bardons*, PATTESON, J., refers to the cases of *Robinson v. Raley* and *O'Brien v. Saxon*, as authorities to show that the replication *de injuriâ* is not objectionable on account of its putting in issue several facts, “provided the several facts, so put in issue, constitute *one cause of defence*; which, as it seems to me” (his lordship said) “they always will, where the plea is properly pleaded, however numerous they may be; *since, if they constitute more than one cause, the plea will be double*.”(a) The same principle is laid down by the court in *Purchell v. Salter*. In *Bell v. Tuckett*, TINDAL, C. J., said, “I have always understood the rule to be, that a plea or replication is double where it contains two or more substantive answers; as for instance, in **assumpsit*, a [757 plea alleging a misnomer *and* a non-joinder of parties, would be a double plea in abatement. So, in an action for goods sold and delivered, a plea alleging payment *and also* a release would be bad for duplicity, as putting forward two several defences, each of which would be a complete answer to the action. * * * Now, unless the defendant makes out that the plea amounts to a release, it affords no answer.” And subsequently his lordship, after commenting upon *Bennison v. Thelwall*, observed, “That case brings the question to the well-known distinction between a replication putting in issue several allegations in the plea, either of which, *per se*, would be a good answer, and a replication taking issue on several allegations which together amount only to one single defence.”

In *Griffin v. Yates* it was not decided that the separate facts might not be traversed; the court merely suggested that the shortest way of doing so was by replying *de injuriâ*, as in *Isaac v. Farrar*. Several facts were also allowed to be put in issue in *Wilkins v. Boutcher*, antè, Vol. III. p. 807, 4 Scott, N. R. 425, 1 Dowl. N. S. 478; *Eden v. Turtle*, 10 M. & W. 635, 2 Dowl. N. S. 459; *Scott v. Chappelow*, antè, Vol. IV. p. 336, 5 Scott,

(a) 3 B. & Ad. 9. It seems to follow, that in all cases where the plea is good, the issue taken by the replication cannot be double; a rule which, if adopted, will be of more easy application than the rule in *Crogate's case*.

N. R. 148, 2 Dowl. N. S. 78; *Garten v. Robinson*, 2 Dowl. N. S. 41, and *Webb v. Weatherby*, 1 N. C. 502, 1 Scott, 477. *Brogden v. Marriott*, 2 N. C. 473, 2 Scott, 703, is strongly in point for the plaintiffs, and in principle is not to be distinguished from the present case. *Regil v. Green*, 1 M. & W. 328, is quite consistent with the above principle; and Lord ABINGER, C. B., there observed, in the course of the argument:—"If you put two distinct defences into one plea, has not the plaintiff a right to reply to both?" In *Palmer v. Gooden*, 7 M. & W. 486, the defendant pleaded to an action of *758] covenant for rent *due for turnpike-tolls, that, before it became due, the trustees entered into and upon a certain part of the tolls, and then ejected the defendant from the possession thereof; the plaintiff replied that the trustees did not enter into and upon the said part of the tolls, or eject the defendant from the possession thereof, *modo et formâ*; and this replication was held bad by the court of Exchequer, as putting in issue not only the expulsion, which was the only material allegation of the plea, but also the entry, which was immaterial. But this decision was reversed in error,(a) upon the ground that the defendant having mixed up the entry and expulsion as constituting the eviction,(b) the plaintiff had a right to follow him, and to accept the issue as tendered. In *Moore v. Boulcott*, 1 N. C. 323, 1 Scott, 122, 3 Dowl. P. C. 145, where, to an action on an attorney's bill, the defendant pleaded that the bill was for work at law and in equity, and had not been delivered a month before action, a replication that the bill was not for work at law *and* in equity, was held bad, not as being double, but as tendering an immaterial issue; since the plea was an answer to the action if the claim were for charges either at law *or* in equity. The cases which have been decided upon the doctrine of negative-pregnancy, such as *Myn v. Cole*, Cro. Jac. 87,(c) stand upon a totally different footing.

Shee, Serjt., in reply, referred to Co. Litt. 126 a, to show that an issue must be upon a single point. *Cur. adv. vult.*

TINDAL, C. J., now delivered the judgment of the court. This is an action of trover, to which the defendant has pleaded various pleas; and, *759] the plaintiff *having replied, the defendant has demurred to the replications to the third, fourth, fifth, sixth, and seventh pleas.

As the same question arises upon each of the replications, it is sufficient to advert to the third plea and the replication thereto. That replication is objected to on the ground that it is double, and puts in issue two separate and independent facts, either of which, it is contended, is separately traversable, and the traverse of either of which is said to afford a complete answer to the plea, namely, the fact of Douglas, Anderson & Co., being intrusted with the dock-warrants mentioned in the plea, and also the fact of their agreeing to pledge the bales of silk described in those dock-warrants.

(a) 8 M. & W. 890.

(b) In the case cited, the *one* act—adverse perception—would constitute both the entry and the expulsion alleged.

(c) See as to negative-pregnancy, *antè*, Vol. VI. 702, 1 C. B. 586, note (a).

As a general proposition, it cannot be denied that a number of facts may be so connected together as to form but one point of defence, so as to admit of their being all put in issue in one and the same traverse; a familiar illustration of which rule occurs where assignees of a bankrupt sue in trover, and the plaintiffs allege they were possessed as assignees; the defendant may plead that the plaintiffs were not possessed as assignees, and thereby put in issue the whole of that complicated chain of facts which goes to constitute a valid title in the plaintiffs as assignees. The difficulty, however, arises, not in laying down the rule,—which is well established,—but in the application of it to each particular case. It is frequently a matter of difficulty to say whether several facts, which go towards the constituting a defence, are so connected together as to form one complex point of defence, so as to admit of their being joined in one traverse, or whether the several facts together constituting a defence, are so disconnected that the opposite party is bound to select one single insulated fact and traverse it, and, by so doing, to admit all the rest.

In the case of *Robinson v. Raley*, which is a leading *case on this subject, the defendant, to an action of trespass *quare clausum fregit*, appears to have pleaded a prescriptive right of common, and that he put his cattle into the *locus in quo*, being his own commonable cattle levant and couchant. The plaintiff traversed that they were his (the defendant's) own commonable cattle, levant and couchant; and the court held that this whole complex proposition was capable of being joined in one traverse. This case has been followed by many others which were cited in argument, namely, *Bennison v. Thelwall*, *Purchell v. Slater*, *Bell v. Tuckett*. It is not necessary to examine these cases in detail, because the principle on which they proceeded was not disputed, but only the application of that principle to the present case. [*760]

The plea in this case alleges that Douglas, Anderson & Co., were intrusted by the plaintiffs with certain dock-warrants for the delivery of four bales of silk, therein described, and had applied to the defendant for an advance of money upon the pledge of the said four bales of silk, and that it was agreed between the defendant and Douglas, Anderson & Co., that they should pledge with the defendant the said four bales of silk, as a security for the money. The plea further alleges the delivery of the dock-warrants, the pledging of the bales of silk, and an advance of money thereupon, and so justifies the conversion of the goods.

The question is, whether the two allegations in the plea, namely, that Douglas, Anderson & Co. were intrusted with the dock-warrants mentioned in the plea, and that they agreed to pledge the silk mentioned in these dock-warrants with the defendants, constitute one point of defence; or whether the plea consists of two separate and independent allegations, each of which, if traversed separately, is an answer to such plea. And we think these allegations in the plea are of the latter description. They are allegations of facts independent *of each other. The denial that the [*761]

factors were intrusted with the dock-warrants, is a complete answer to the plea, and, if found for the plaintiff, would entitle him to the verdict: again, the denial that they agreed to pledge the silks with the defendant, is a complete answer to the plea, and, if found for the plaintiff, entitles him to the verdict. In *Robinson v. Raley*, where the defendant alleges that the cattle he turned on to the *locus in quo*, were "his own commonable cattle, levant and couchant," he is giving a *description* of the same identical cattle; and the replication only denies the truth of his entire description of the same cattle. But, in the present case, the defence consists of two separate facts, occurring at different times—the intrusting to the factors by the plaintiff, at one time—the agreement to pledge between the factors and the defendant, at another; which facts are independent of each other, and have no necessary connection. (a) The present case resembles very nearly that of *De Wolf v. Bevan*, determined by the court of Exchequer in last term. (b)

For the reason above given, we think the replications are too large, and ought not to be allowed; but we think it not unreasonable,—the question being one of considerable nicety,—that the plaintiff should be at liberty, if he shall be so advised, upon payment of costs, to amend his replication, and to take issue on either of the separate allegations in the plea.

Rule accordingly.

(a) In *Robinson v. Raley* there was no connection between the fact of ownership, the fact of levancy and couchancy, and the fact that the cattle were of such kind or kinds as to come within the description of *commonable* cattle. It is true that these facts coincided in point of time, and also that they were such as could not have occurred in different counties, so as to give rise to the difficulty suggested by the court in M. 5 H. 7, fo. 7, pl. 14, ante, 753.

(b) Since reported, 13 M. & W. 160, 2 D. & L. 345.

*762] *ELIZABETH DAVIES, Demandant; W. S. LOWNDES,
(Heir of W. S. LOWNDES,) Tenant. June 29.

The issuing of a writ of right by journeys-accounts after the 31st of December, 1834, is not warranted by an original writ of right pending on that day, which has since abated by the death of the tenant.

But all the proceedings appearing fully upon the count on the second writ, the court refused to set aside the writ of *grand cape* and subsequent proceedings, leaving the tenant to raise the question by demurrer.

Querr. whether a writ by journeys-accounts lay where the former writ had abated by the death of a sole tenant?

The tenant cannot, with the general mise, plead other pleas raising questions of fact for trial by an ordinary jury.

This was a writ of right (c) brought to recover lands in Buckinghamshire. The writ was originally sued out on the 6th of December, 1832; (d)

(c) The tenure being *in capite*, *infra*, 675.

(d) By the 3 & 4 W. 4, c. 27, s. 36, it is enacted, "that no writ of right-patent, *right-close*, &c., &c., and no other action, real or mixed, (except a writ of right of dower, or writ of dower under nihil habet, or a quare impedit, or an ejectment,) and no plaint in the nature of any such writ or action, (except a plaint for free-bench or dower,) shall be brought after the 31st day of December, 1834."

By sect. 37 it is enacted, "that when, on the said 31st day of December, 1834, any

and Thomas Davies and (the present demandant) Elizabeth his wife *were the demandants therein in the right of the said Elizabeth. [*763]

The mise was joined on the mere right.(a)

The cause was twice tried at the bar of this court in Easter term, 1835,(b) and at the sittings after Michaelmas vacation, 1838 ; (c) and, on both occasions, the grand assize returned a verdict for the tenant.(d)

Between the two trials, (viz. on the 9th of May, 1835,) Thomas Davies died ; and a suggestion of that fact was duly entered upon the record. .

A bill of exceptions having been tendered at the second trial, the errors assigned were argued in the Exchequer Chamber in Hilary and Michaelmas vacations, 1842, when that court again awarded a *venire de novo*.(e)

Between the finding of the second verdict and the first argument on the last-mentioned bill of exceptions, (viz. on the 17th of May, 1840,) the tenant died.

In Hilary vacation, 1843,(g) a fresh writ, by journeys-accounts, was sued out against the present tenant, as heir (h) of the former tenant. In the following Easter term, an application was made in Chancery, on behalf of the tenant, to set aside this writ, on the ground of its having issued after the 31st of December, 1834.(i) The Lord Chancellor ultimately refused the application.(k)

On the 29th of April, 1843, (pending the motion before the Chancellor,) the tenant not having appeared, *a writ of grand cape issued, under which he was summoned ; and on the 3d of May an appearance was entered for him. [*764]

On the 2d of November the demandant delivered a count, as follows :—

“ Buckinghamshire, to wit :—Elizabeth Davies, by Daniel Davies, her

person who shall not have a right of entry to any land, shall be entitled to maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought at any time before the 1st day of June, 1835, in case the same might have been brought if this act had not been made, notwithstanding the period of twenty years, hereinbefore limited, shall have expired.”

By sect. 38 it is enacted, “ that when, on the said 1st day of June, 1835, any person whose right of entry to any land shall have been taken away by any descent cast, discontinuance, or warranty, might maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought after the said 1st day of June, 1835, but only within the period during which, by virtue of the provisions of this act, an entry might have been made upon the same land by the person bringing such writ, &c., if his right of entry had not been so taken away.”

(a) See the pleadings, 1 N. C. 597, 2 Scott, 71.

(b) Cor. Tindal, C. J., Park, Gaselee, and Bosanquet, Js.

(c) Cor. Tindal, C. J., Vaughan, Bosanquet, and Coltman, Js.

(d) See all the previous proceedings stated, antè, Vol. I. p. 473, Vol. VI. p. 471.

(e) Antè, Vol. VI. p. 471, 7 Scott, N. R. 141.

(g) See antè, Vol. VI. p. 529, 8 Scott, N. R. 539.

(h) Whether his seisin was by descent or by purchase, appears to be immaterial. An alienation by the former tenant would not defeat any right which the demandant might have to sue by journeys-accounts.

(i) Vide antè, 762 (a).

(k) Vide antè, Vol. VI. p. 529, 7 Scott, N. R. 217.

attorney, demands against William Selby Lowndes the manors of Whaddon Nash Giffords, otherwise called Whaddon Nash and of Giffords manor, in Whaddon, Tottenhoe, otherwise Tattenhoe, otherwise Tatnall, otherwise Tattenhall, and Westbury, otherwise Westberry, and of the manor of Wavendon, otherwise called Wandon, otherwise called Whaddon and Nash, in the county of Buckingham, containing divers, to wit, 5000 acres of arable land, 5000 acres of pasture land, &c., and divers, to wit, four other manors in the said county respectively, containing divers, to wit, 500 messuages, and 500 buildings, &c., with the rights, members, and appurtenances to the said manors belonging, and also 50 other messuages, 50 cottages, &c., 5000 other acres of arable land, &c., with common of pasture thereunto belonging and appertaining, situate, and being in the several parishes of Whaddon, Great Horwood, Little Horwood, Tottenhoe, otherwise, &c., Shenley, Great Lyndford, Mursley, and Bletchley, and of the rectory of Tottenhoe, otherwise, &c., with the appurtenances, in the county of Buckingham, which she the said Elizabeth claims to be her right and inheritance, by writ of our said lady, the now queen, of right : and whereupon she says, that, long before the commencement of this suit, and before the passing of an act of parliament made and passed in the session of parliament holden in the third and fourth years of his late majesty, King William the Fourth,^(a) to wit, on the 6th of December, 1832, one Thomas *765] Davies, since deceased, who then was the lawful husband of the said Elizabeth, together with her, the said Elizabeth, sued and prosecuted, and there was then duly sued and prosecuted forth of the High Court of Chancery of our lord the then King William the Fourth, against William Selby Lowndes, since deceased, the tenant of the said premises with the appurtenances, a certain writ of our said lord the king, called a writ of right, whereby our said late lord the king commanded the then sheriff of Buckinghamshire that he should command the said William Selby Lowndes, since deceased, that justly and without delay he should render unto the said Thomas Davies and Elizabeth his wife the tenements aforesaid, with the appurtenances, which the said Thomas Davies and Elizabeth his wife, in right of the said Elizabeth, claimed to be the right and inheritance of the said Elizabeth, and to hold of our said lord the king, in chief,^(b) and whereof they claimed that the said William Selby Lowndes, since deceased, unjustly deformed them ; and that unless he, the said William Selby Lowndes, since deceased, should do so, and if the said Thomas Davies and Elizabeth his wife should give the said sheriff security to prosecute their claim, then that the said sheriff should summon by good summoners the said William Selby Lowndes, since deceased, that he should be before the said king's justices, at Westminster, on the 8th day of January next, to show wherefore he had not done it ; and that the said sheriff should have there the summoners and that writ ; which writ was tested in

(a) 3 & 4 W. 4, c. 27.

(b) i. e. without a *meum* ; vide *Serviens ad legem*, 257, note (g) ; *suprà*, 763 (a).

the name of the said king himself, at Westminster, on the 6th day of December, in the third year of his reign (1832): which writ of right was then, and before the return thereof, to wit, on the day and year aforesaid, delivered to the said sheriff of Buckinghamshire to be executed in due form of law: that the said sheriff afterwards, to wit, *on the 8th of January, 3 W. 4, returned and certified to the said court before his said majesty's justices at Westminster, amongst other things, that by J. G. and J. G. the younger, he had summoned the said William Selby Lowndes, since deceased, according to the said writ of right, and that after the aforesaid summons made, he made proclamation of the said summons, according to the form of the statute; that thereupon such proceedings were then had upon the said writ, in the said court before his said majesty's justices of the Bench, that afterwards, to wit, on the 2d of November, in the fourth year of the reign of the said late king, the said Thomas Davies, since deceased, and the said Elizabeth his wife, the now demandant, duly counted in and upon the said writ, in the said court, and in and by their count in that behalf, by A. H. Smith, their attorney, said that they demanded against the said William Selby Lowndes, since deceased, the said manors, &c. (setting out the original count:)(a) And that thereupon such proceedings were then had in the said court before the justices of the Bench, that the said William Selby Lowndes, since deceased, then, to wit, on the 11th of January, in the fourth year of the reign aforesaid, by T. White, his attorney, came into the said court before the justices of the Bench, and defended the right of the said Thomas Davies and Elizabeth his wife, (setting out the mise, followed by the tender of the demi-mark.")(b)

The count then proceeded to set out all the proceedings subsequent to the tender of the demi-mark,—the first trial; the exceptions tendered to the ruling of the court;(c) the verdict for the tenant and judgment thereon; the suggestion of the death of Thomas Davies, the husband of the demandant, on the 9th of May, 1834; the first writ of error, tested the 14th of November, *6 Will. 4, (1835,) the assignment of errors in the Exchequer Chamber; the judgment of reversal, in that court, of the judgment of the court of Common Pleas, and the award of a *venire de novo* thereon.(d) It then, in like manner, set out the proceedings preparatory to the second trial; the second trial and the verdict found therein for the tenant, and the judgment thereon; the exceptions tendered at the second trial to the ruling of the court;(e) the second writ of error, tested the 16th of June, 3 Vict. (suggesting the death of the former tenant, since the judgment, leaving a son and heir,(g) to wit, the present tenant); the assignment of errors in the Exchequer Chamber; the reversal of the judgment of the court below; and the award of another *venire de novo* thereon.(h)

(a) Vide 1 N. C. 597. (b) Vide *antè*, Vol. VI. p. 475. (c) 1 N. C. 597, 2 Scott, 71

(d) 4 N. C. 478, 5 Scott, 635.

(e) 5 N. C. 161, 6 Scott, 738.

(g) *Supra*, 763 (h)

(h) *Antè*, Vol. VI. p. 471, 7 Scott, N. R. 141.

The count then proceeded as follows:—

And the said Elizabeth further saith that she thereupon, by journeys-accounts, that is to say, within fifteen days next after the giving of the last-mentioned judgment by the said court of Exchequer Chamber, and the said reversal of the last-mentioned judgment of the said court of Common Bench, freshly brought this present suit, wherein she now counts by them, and within the said fifteen days, to wit, on the 8th day of February, 1843, suing and prosecuting forth of the high court of Chancery of our lady the now queen: and the said Elizabeth did, within the said fifteen days, to wit, on the day and year last aforesaid, sue and prosecute forth of the high court of Chancery of our lady the now queen, against William Selby Lowndes, the now tenant of the said tenements with the appurtenances, a certain writ of our lady the now queen; and that the last-mentioned writ was and is *768] in the words following, that is to say:—"Victoria, by the grace of God, of the United Kingdom, &c., to the sheriff of Buckinghamshire greeting: Command William Selby Lowndes, Esq., that justly and without delay he render unto Elizabeth Davies the manors of, &c., &c., (setting out the writ *verbatim*, which was of the same tenor as the former writ, *mutatis mutandis*, summoning the tenant to appear on the 15th of April, 1843, and tested the 8th of February, 1843.) And the said Elizabeth saith that the said William Selby Lowndes in the last-mentioned writ mentioned was and is the same William Selby Lowndes in the said writ of our lady the queen, called a writ of *scire facias ad audiendum errores* mentioned, (a) and was and is the son and heir of the said William Selby Lowndes, deceased, in the said former writ of right mentioned; and that the tenements in the said several writs and proceedings respectively mentioned, and hereinafter demanded, were and are the same identical tenements; and thereupon the said Elizabeth, by her attorney Daniel Davies aforesaid, demands against the said William Selby Lowndes, so being the son and heir of the said William Selby Lowndes in the first-mentioned writ of right mentioned, the said manors of Whaddon, &c., &c., with the appurtenances in the county of Buckingham, which she the said Elizabeth claims to be the right and inheritance of her the said Elizabeth by the last-mentioned writ of our said lady the queen, of right; and whereupon she says that Thomas James Selby, deceased, whose heir the said Elizabeth is, was seised of the tenements aforesaid, with the appurtenances, in his demesne as of fee and right, in the time of peace, in the time of Lord George III. late King of Great Britain, within sixty years next before the commencement of the said suit *769] wherein the said Thomas Davies and Elizabeth his wife, the now *demandants, were demandants, and whereof the present suit is a continuation by journeys-accounts as aforesaid, by taking the esplees thereof, to the value," &c.

The count then proceeded to trace the pedigree from Thomas James Selby through Catherine, Frances, and Mary Lloyd, down to the demand-

(a) Upon the second writ of error above mentioned.

in^t, (a) omitting all mention of Thomas Davies, the demandant's late husband, and concluded as follows:—

“ Which said Elizabeth thereupon, and before the commencement of this suit, became and was entitled to the whole of the said tenements, with the appurtenances, as such heir and cousin of the said Thomas James Selby as aforesaid, and which said Elizabeth now demands the same; and that such is her right, she offers, &c.”

On the 12th December, 1843, the tenant obtained from COLTMAN, J., an order for leave to plead several matters, and on the same day delivered the following pleas:—

First, the general mise.

Secondly, that after the right of the tenements aforesaid, with the appurtenances, descended from the said Erasmus Lloyd to the said John Lloyd, as in the count of the demandant alleged, and before and at the time of the levying of the fine hereinafter mentioned, one William Selby was seised in his demesne as of fee of the tenements above demanded, and being so seised, afterwards, to wit, on the morrow of the Ascension of the Lord, in the 24 Geo. 3, in the court of the late lord King George III., of the Bench at Westminster, a certain fine was, in due manner, levied in the said court of our said late lord King George III., of the Bench, before Alexander, Lord Loughborough, Henry Gould, George Nares, and John Heath, justices of the said late lord King George III., between one John Skirrow, by the name of John Skirrow, gentleman, plaintiff, and the said *William Selby, by the name of William Selby, Esq., deforciant of the afore-
[*770
said tenements, by the names of the manors of Whaddon Nash Giffords manor, in Whaddon, Tottenhoe, otherwise Tattenhoe, otherwise Tatnall, otherwise Tattenhall, and Westbury, otherwise Westberry, with the appurtenances, and of the site of the priory of the dissolved monastery of Snelshall, otherwise Snelleshall, with the appurtenances, and also of Whaddon Chase with the appurtenances, and likewise of thirty-five messuages, twenty cottages, twenty cow-houses, fifty barns, &c., &c., 32*l.* rents, common of pasture for all cattle, free warren, view of frank-pledge, courts-leet, courts-baron, fines, amerciaments, reliefs, heriots, goods and chattels of felons and fugitives, felons of themselves, deodands, waifs, and estrays, with the appurtenances, in Whaddon, Nash, Great Horwood, Little Horwood, Snelsborough, Tottenhoe, otherwise, &c., Shenley, Great Lynford, Mursley, Saldon, and Bletchley, &c.; and moreover of the rectory of Tottenhoe, otherwise, &c., with the appurtenances, and of the advowson of the vicarage of the church of Tottenhoe, otherwise, &c.; whereupon a plea of covenant was summoned between them in the same court, that is to say, that the aforesaid William Selby had acknowledged the aforesaid manors, site, &c., &c., with the appurtenances, and the advowson aforesaid, to be the right of him the said John Skirrow, as those which the said John Skirrow had of the gift of the aforesaid William Selby, and those he had remised and quit-claimed

from him and his heirs to the aforesaid John Skirrow and his heirs for ever; and, moreover, the said William Selby granted, for him and his heirs, that they would warrant to the said John Skirrow and his heirs the said manors, &c., against him the said William Selby and his heirs for ever; and for that acknowledgment, remise, quit-claim, warranty, fine, and agreement, the said John Skirrow gave to the said William Selby 4920*l.*; which fine, in *771] form aforesaid levied, was then and there *engrossed, and afterwards, according to the form of the statutes in that case made and provided, was openly and solemnly read and proclaimed, in form following, that is to say, the first proclamation thereupon was made on, &c., &c.; as by the said fine with the proclamations in form aforesaid made, remaining of record in the said court of our said lady the queen, of the Bench, at Westminster aforesaid, may more fully and at large appear. And the said William Selby Lowndes saith that at the said times of reading the said fine, and making the said proclamations thereupon, in form aforesaid made, all pleas in the said court of the said late sovereign lord King George III. of the Bench, ceased, according to the form of the statute in that case made and provided; which fine, with the proclamations aforesaid so levied as aforesaid, was levied to and for the use of the said William Selby, party thereto, his heirs and assigns for ever: by virtue of which fine the said William Selby, party thereto, was seised in his demesne as of fee of the tenements with the appurtenances above demanded,—all the estate of which William Selby in the tenements aforesaid, he the said William Selby Lowndes, now hath. And the said William Selby Lowndes further saith, that the said John Lloyd, at the time of the levying of the said fine, was within the four seas, of whole memory, of full age, and out of prison; and that the seisin of the said William Selby of and in the tenements aforesaid, with the appurtenances above demanded, and of one John Ford, who afterwards, to wit, on the 14th of April, 1788, had, took, and acquired all the estate of the said William Selby in the tenements aforesaid, with the appurtenances, continued during five years next after the proclamations aforesaid in form aforesaid made, without any action at law being prosecuted against the said William Selby and John Ford, or against either of them, by the said John Lloyd, or any person or persons claiming by, *772] through, or under him, *or by, through, or under the said Erasmus Lloyd, or either of them.—Verification.

Thirdly. That the writ of right by which the said Elizabeth Davies now demands the aforesaid tenements, was not brought before the 1st of June, 1835, but was brought after that day, to wit, on the 8th February, 1843: that, on the said 1st June, 1835, the said Elizabeth Davies could not, nor could the said Elizabeth Davies and her then husband Thomas Davies, have brought and maintained a writ of right in respect of the tenements aforesaid, although a certain act of parliament made and passed in the session of parliament holden in the 3 & 4 W. 4, c. 27, intituled, &c., had not been made.—Verification.

Fourthly. That Thomas James Selby, in the said count mentioned, was not seised of the tenements aforesaid, with the appurtenances, or of any part thereof, in his demesne as of fee and right, within sixty years next before the commencement of this suit; concluding to the country.

Fifthly. That, although true it is that William Selby Lowndes, the now tenant, was and is the son and heir of the said William Selby Lowndes, deceased, for plea, nevertheless, in this behalf he saith that the tenements aforesaid, with the appurtenances, did not, nor did any part thereof, descend or come to him as heir of the said William Selby Lowndes, deceased; concluding to the country. (a)

Sir T. Wilde, Serjt., in last Hilary term, (Jan. 15th,) on behalf of the tenant, obtained a rule nisi to set aside the writ of grand *cape*, the sheriff's return thereto, the count, and all subsequent proceedings, upon the ground *that the writ by journeys-accounts was an original writ, and not a [773 mere continuation of the prior writ. He referred to the motion in chancery, (b) *Leigh v. Leigh*, 2 N. C. 464, 2 Scott, 666, 4 Dowl. P. C. 650; *Foot v. Shirreff*, 2 N. C. 528, 2 Scott, 806, 4 Dowl. P. C. 652; and *Foot v. Collins*, 1 Mylne & Cr. 250.

Tulfourd, Serjt., on the same day, on behalf of the demandant, obtained a rule nisi to rescind the order of COLTMAN, J., allowing the tenant to plead several matters, and to set aside the pleas pleaded in pursuance thereof, or that the tenant should elect between the general issue and the other pleas, and that either the said first plea or such other pleas should be struck out; upon the ground that such pleas raised issues which required different modes of trial: he referred to *Galton dem. Harvey ten.*, 1 B. & P. 192; *Tissen dem. Clarke ten.*, 3 Wils. 419, 541, 2 W. Bl. 891, Loffi, 496; and Com. Dig. tit. *Battel* (A. 3), tit. *Pleader* (E. 2).

Tulfourd, Serjt., and E. V. Williams, (c) (with whom was Willes,) in last Easter term (30th April) (d) showed cause against the rule obtained on behalf of the tenant.

A writ issues by journeys-accounts, (*per dietas computatas*,) where a former writ has abated without default of the plaintiff or demandant; in which case he may purchase a new writ within as little time as he possibly can after the abatement of the first writ; and fifteen days are considered a reasonable time for the purchase of such new writ. Termes de la ley, tit. *Journies Accounts*, and Com. Dig. tit. *Abatement* (P.) (e) The meaning of the term is thus explained by TREBY, C. J., in *Kinsey v. Heyward*, 1 Ld. Raym. 432. (g) "The word *dieta* signifies a day's [774

(a) *Quære*, whether this plea—which admits that the father died seised, that the son is the next heir, and that the son is now seised—is not bad for not showing by what means the apparent descent was interrupted, and as being a traverse of a conclusion of law.

(b) *Davies v. Lowndes*, ante, Vol. VI. p. 529, 7 Scott, N. R. 215.

(c) The latter, as having been in that, which, according to the contention of the demandant, was the same cause, when the court was *de facto* open. Vide 6 N. C. 239.

(d) Before Tindal, C. J., Coltman, Erskine, and Cresswell, Js.

(e) Citing *Spencer's case*, 6 Co. Rep. 10 b.

(g) S. C. 1 Lutw. 256, 260, S. C. *Anon.* 12 Mod. 229, and in error, in B. R. 12 Mod. 568

journey, and the best account of the word is given by Selden, that the chancery being a movable court, and following the king's court, and the writs being to be purchased out of the said court, the party who purchased the second writ ought to have applied to the king's court as hastily (that he might obtain the second writ) as the distance of the place would allow, accounting twenty miles for every day's journey." (a)

Before the Lord Chancellor, the argument for the tenant was, that the writ by journeys-accounts had issued improvidently, and that it did not connect the two suits. And his lordship certainly expressed a strong opinion that the writ could not issue under the circumstances; but he thought the question ought to be raised on the record, and declined to interfere in a summary way. Upon the face of the writ itself there is nothing to show that it issues by journeys-accounts; (b) and the usual course is,

(a) His lordship had previously said he did not well apprehend the meaning of the said words, (*per dielas computatas*.)

At common law (confirmed by the statute *Articuli super chartas*, 28 E. 1, c. 15,) a defendant or tenant was always allowed fifteen days, at least, to appear to the summons; upon the principle that each day's travel or journey being calculated at twenty miles, it was presumed that fifteen days might be sufficient to enable the party summoned to appear in the court, wherever it might be held in England. See Glanw. L. 1, c. 7; Bract. L. 4, fo. 235 b; Brit. 2, 121; Fleta, l. 6, c. 6, § 11, (edit. Seld.; this chapter is not contained in the edition by Howard,) Mirr. c. 2, § 19. Even when common pleas were to be determined in a certain place, though they no longer followed the king, the place for the holding of such pleas was fixed as the crown from time to time directed. (*Serviens ad legem*, 200.) The same computation of distance and time would appear to have been required whether the object of the journey was purchasing, or appearing to, a writ.

(b) In *Kinsey v. Heyward*, 1 Ld. Raym. 432, where the plaintiff declared as administratrix to her husband, against the defendant, as executor of Heyward, in *indebitatus assumpsit*, and the defendant pleaded the statute of limitations, the plaintiff replied that her husband sued a writ of *clausum fregit*, returnable in C. P., upon which he intended to declare in *assumpsit* for this debt against Heyward, (the testator;) that Heyward died, and the plaintiff's husband sued another writ against the defendant; that then her husband died, and she being administratrix, sued the then writ. It appears to have been argued that this latter writ was maintainable by *journeys-accounts*; but Trehy, C. J., in giving judgment, said, "In this case there is nothing of journeys before us; for the second writ is not said to be brought *per dielas computatas*, as all the precedents are;" and his lordship, after giving Selden's explanation of the word *diela*, (*ut supra*, p. 774,) added, "for this reason he was to show, in the second writ, that he had purchased his second writ as hastily as he could, accounting the days' journeys he had to the king's Court." The latter sentence does not appear to be consistent with what is said in *Spencer's case*, 6 Co. Rep. 12 b. "The alleging of journeys-accounts is always either by way of counter-plea, to oust the tenant of voucher, or by way of replication, as it is more commonly to oust the tenant to plead non-tenure, or joint tenancy, or any other plea which arises as matter after the date of the first writ." And the precedents appear to bear out this position of Lord Coke's. See *Rast. Ent.* 417 a, tit. *Journeys-Accounts*, where T., the tenant, having pleaded that he could not render the message to the demandant because he was not tenant thereof at the time of suing out the original writ, the demandant replied that he had sued out a former writ against T., then being the tenant, which writ the tenant abated by wager of law, whereupon the demandant, *per dielas computatas, recenter tulit quoddam aliud breve*; and then, after stating further proceedings, and the appearance of the tenant after various essoins cast, the replication avers that T., on the day of suing out the first original writ, was tenant, &c., and concludes to the country, whereupon issue is joined. See also *Ib.* 107 b, tit. *Lriefe*, *Congee de purchaser melior brieve*, where there is an entry on the record of a confession by the plaintiff in error, that the writ of error is not maintainable, and a prayer for leave to purchase a new writ, which is granted, and the former writ being quashed, a new writ by journeys-accounts is issued. See also *Lib. Intr.* fo. 91 a.

On the other hand, in *Mole's case*, Cro. El. 174, where M. had brought a *quare impedit* and died, and a motion was made to have another writ by journeys-accounts for his executors, the court granted it, but said, "Regard well, if it lieth in this case or not, and in what form the writ shall be." And in *Walshall v. Aldrich*, Cro. Jac. 589, it is said *arguendo* that "a writ

*that when the tenant comes in and pleads a statute of limitation, or some such defence, then the demandant, by counter-plea, sets up the writ issued by *journeys-accounts within the period of limitation. In that way the question arises on the record, as is shown in Rast. Ent. 107, 417. Here, the issuing of the writ is shown in the count; it is, therefore, already upon the record; and this court is called upon to do the very thing which the Lord Chancellor refused to do. His lordship's judgment affords a strong argument against the interference now prayed for.

The 36th section of the 3 & 4 W. 4, c. 27, *suprà*, p. 762 *n.*, enacts, "that no writ of right, &c. &c. shall be *brought*" after the day specified. It does not say that no writ of right shall *issue*. The meaning of the enactment clearly is, that no new action, in any of the forms specified, shall be brought after that time. Vested interests are provided for by other sections of the statute. (a) The question upon this statute is, whether this writ, sued out by journeys-accounts, is a new writ, or a continuation of the old writ, which was clearly issued in time. That a writ may be sued by journeys-accounts after the death of a sole tenant or defendant, and will place the demandant or plaintiff in the same position as before, appears from the Y. B. 10 E. 3, 16 a, (b) 8 H. 5, 6 a. (c) *In F. N. B. 32 C. it is said, "If a disturber present unto an advowson, and the patron brings an

of journeys-accounts is always where the writ is abated by the death of one of the plaintiffs or defendants, or by reason of misprision in the first writ, or by some default or misprision of the clerk, or other like cause, which ought to be manifested in the said writ."

(a) See sections 37 and 38, *suprà*, p. 762, *n.*

(b) "Dionise la Rivere brought her *quare impedit* against the Prior of the Hospital of St. John of Jerusalem in England; and says, that by wrong he disturbs her to present a proper person to the prebend of S. in the church of our Lady of Salisbury; and says that such a one, her ancestor, presented to the same prebend, his clerk, one Master Henry de Clif. [Clifford,] who on his presentation was received and instituted by the bishop; after whose death the prebend became, and now is, void.

Scott [William Scott, King's Serjt.]—Sir, we tell you, that at this day the prebend is full. (*plein et counsel*), by one R. de Stafford, presented by this prior who now is; and the day of the purchase of this writ, and for seven months before this writ was purchased, it was full by one Gribaud, on the presentation of the predecessor of the prior who now is. Wherefore we pray judgment, if you shall be received to this writ.

Bassel [Serjt.]—After the death of Henry de Clifford, presented by our ancestor, within the six months we brought our writ against the prior, the predecessor of this prior, which writ abated by the death of that same prior; and we freshly purchased this writ against the prior who now is. Wherefore we pray judgment, if this writ be not good enough, and the first writ was of the date of the 3d day of June, Anno 8, [1334.]

Hill [qu. John de Hildesley, removed from the office of Baron of the Exchequer the year before (1335)]—Say how this writ was continued.

Bassel—We have said, and say again, that it was continued until it was abated by the death of that prior, and then we freshly purchased, &c.

Hill—You ought to allege the continuance.

Bassel—If the writ was not continued rightfully, you ought to show it for your advantage.

Parn. [Roh't. Parning, King's Serjt.]—Sir, we will tell you willingly; for we say that to the first writ, Dionise appeared on the quindene of St. Hilary in the year 20 [27 January, 1345, 1346,] and had a day over until the quindene of Easter next coming; within which time this writ was purchased, pending the other; and therefore it is abatable. Judgment of the writ.

Bassel—We intend that, although we had a day here, as you have said, on the other writ, yet if the prior died before the quindene of Easter, that the writ, in law, was then abated by

(c) For note (c) see next page.

*778] assise of *darrein presentment*, and, pending the writ, the incumbent
 *dieth, if the disturber presenteth another incumbent and dies,
 yet the patron shall have an assise of *darrein presentment* upon the first

his death; therefore we might now purchase another writ; therefore the first writ could not be said to be pending *in law*.

Parn.—It may be thus; namely, if the prior was dead before the day that was given to you, then you might now purchase a new writ, without waiting for the day that was given you in court: but if the prior was dead at that day when you took your adjournment, you have,—inasmuch as you have taken the adjournment,—as against the party, waived your advantage as to the taking cognisance of his death till you have a day in court: forasmuch as you ought not now, after his death, to purchase a new writ till the day is passed that was given you in court; and we tell you that the prior did not die between the day on which you took your adjournment, and the day that was given you; and therefore this writ is abatable.

Stouf. [John de Stovord or Stouford, Serjeant, made King's Serjeant, 1341, and Justice of C. P. 1343]—We intend that, whether he died before the adjournment or after, so soon as we were apprised of his death, we could by law purchase a new writ; for I know well that if I bring my writ against a man and his wife, and although I take continuance against them, if the baron dies pending the continuance, I may now take out a new writ against the wife, and may maintain it, although the wife be a party to the one original and to the other; and although this was a writ of *novel disseisin*, where it needed not that the defendants should appear.

Ald. [Rich. de Aldeburgh, J. C. P.]—In this writ and in the first writ, the prior was not named by name of baptism; wherefore, although the prior had demised, resigned, &c., the writ had not abated. But let us suppose that at the time of the first writ the prior had demised, and afterwards the process continued against this prior, and then, pending the adjournment, that the prior, who had before demised, died, you could not purchase a new writ till the day was past that you have in court.

Rasset.—Sir, I believe in the case that you have put, that the death of that prior who had demised, would not abate the writ, for that after his demise he was not a party to the writ, &c.

Son. [John de Stonore, J. C. P.]—We see no cause, for any thing that is yet said, that this writ ought to abate. Wherefore say (plead) over, if you will.

Parn.—Sir, We again pray judgment of the writ: for they have said that the other writ abated after the death of the prior, and that this writ was freshly purchased after his death; whereas we say that the predecessor of this prior died the day of St. Nicholas in the eighth year [5 Dec. 1334,] and this writ was purchased the 3d day of February this same year 1334, and therefore not freshly purchased after the death of the prior. Judgment, &c.

Rasset.—It is sufficient for us to purchase our writ freshly after his death; for we could well enough have waited to purchase our writ against this prior till the death of the other prior had been returned by the sheriff, and then have purchased our writ freshly to continue; that we have taken upon ourselves therefore to have cognisance of the death of the prior in another manner than by the answer of the sheriff, is sufficient for us to purchase our writ freshly after that notice comes to us of the death of the prior, and thus we have done. Judgment, &c.

Parn.—It is a truth, you could well have waited to purchase the writ against this prior until the death of the other prior had been returned by the sheriff; but, inasmuch as you did not take upon yourselves to know of his death, and thereupon have taken your purchase on this account, (you) have put the same by your plea that you ought to have purchased your writ freshly after that notice could have come to you of his death, and that you have not done. Judgment, &c.

Ston.—It is not so; for it is sufficient to him to purchase his writ freshly after that notice came to him of his death, and not after that notice could have come to you; and inasmuch as on the quindene of St. Hilary, Dionise appeared and took a day over, then one might well know that she did not know of his (the prior's) death; and this writ is purchased the eighth day after, and so freshly enough after that notice came to him of his death, &c.; wherefore say over.

(The parties then proceed to plead other matters.)

See the comment upon this case, 12 Mod. 577.

c H. 8 H. 5, fo. 5, 6, pl. 22., where the question seems to have been whether, if a bill of account in the Exchequer abated, the plaintiff could have a new bill. The case terminates thus:

Flete [qu.]—It seems to me that, notwithstanding that this bill was abated, he shall have a bill against the same accountant; for, if *quare impedit* be brought against a man, and, after the lapse, the writ is abated, and he purchases another writ freshly, the writ shall be maintained, notwithstanding that the six months be past before the writ purchased; and so here.

Babington. [C. B.]—I grant your case, where the writ abates by the act of God; but where it abates by default of the party,—as for false Latin,—he shall be put to his writ of right, &c.

disturbance, against the heir of *the disturber, by journeys-accounts ; and so if the disturber present two or three times within the six months, the very patron doth have an assise of *darrein presentment* upon the first disturbance." These authorities are referred to in Com. Dig. tit. *Abatement*, (P.), in support of the position, that a demandant, as plaintiff, may have a writ by journeys-accounts, where the former writ has abated "by the death of the tenant or defendant, where there is only one defendant." It is true, that a *dictum* is referred to as *contrà* in Lutw. 260 ; (a) but that *appears to have arisen from a misunderstanding of what was really said by the count. By the stat. 32 H. 8, c. 2, s. 5, (which is in *pari materiâ* with the 3 & 4 W. 4, c. 27,) it is enacted, "that all formations in reverter, formedons in remainder, and *scire facias* upon fines, of any manors, lands, tenements, or other hereditaments, at any time thereafter to be sued, should be sued, used, and taken within fifty years next after that the title and cause of action fallen, and at no time after the said fifty years passed." (b) In a case in Dalison, 3, pl. 7, it was *held under this statute, that where a *scire facias* upon a writ of forme-

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(a) *Kinsey v. Heyward*; S. C. *suprà*, 774, (a) (c). The report in Lutwyche is to this effect:—

"In this case it was objected by Girdler, of counsel with the defendant, that a writ brought by journeys-accounts lies not except between the parties to the same original, or some of them; as if one of the plaintiff, or one of the defendants, dies; but in no case where there is only one plaintiff or one defendant, and the one or the other dies, and that no such writ lies but when the first is served and returned upon record; but in this case there is not either the same plaintiff, or the same defendant, or the same writ, or the same county, or the same cause of action; and also it does not appear that the first writ was ever returned of record. But to all this it was answered and resolved of the court, that the case of journeys-accounts [*quæ* referring to *Spencer's case*, 6 Co. Rep. 9 b] (which was admitted to be good law) was not material to this case here, as the case is. And by the C. J. [*Treby*,] the bringing of the first writ by the testator within six years, put the case out of the statute of limitations, as in the case where one makes entry to avoid a fine; and the case is not like to the case of journeys-accounts, where the first writ ought to be continued until the bringing of the second writ, because this is to bind assets that were at the time of bringing the first writ, or to avoid a counter-plea, or the like.

(b) By sect. 7, it is provided and enacted, "that all and every person and persons which now have any of the said actions, writs, avowries, *scire facias*, cognisance, prescription, title, or claim depending, or that hereafter shall sue, commence, make, or bring any of the said writs or actions, or make any of the said avowries, cognisances, prescriptions, titles, or claim, at any time before the feast of the Ascension of our Lord God, which shall be in the year of our Lord God 1546, [38 H. 8.] shall allege the seisin of his or their ancestors or predecessors, or his own possession and seisin; and also have all other like advantages to all intents and purposes in the same writs, actions, avowries, cognisances, prescriptions, titles, and claims, as he or they might have had at any time before the making of this statute; this act or any thing therein contained to the contrary notwithstanding."

And by sect. 10, it is provided, "that if any person or persons before the said Feast of the Ascension of our Lord God, which shall be in the said year of our Lord God 1546, commence and sue any of the said actions or writs, or make any avowry, prescription, title, or claim, and the same action, writ, avowry, cognisance, prescription, title, or claim happen, by the death of any of the parties to the same, to be abated before judgment or determination thereof had, that then the said person or persons, being demandants or avowants, or making any such cognisance, prescription, title, or claim, being then alive, and if not, then the next heir or heirs of such person or persons so deceased may commence or pursue his or their action and suit, and make his or their avowry, cognisance, prescription, title, or claim, for or upon the same matter, within one year next after such action or suit abated, and shall have and enjoy all and every such liberty and advantage to sue, demand, avow, declare, or make their said titles, claims, or prescriptions, within the said one year, as the demandant or demandants in such writ or writs

don had abated by the death of the king, the demandant might purchase a new *scire facias* by journeys-accounts. (a) [CRESSWELL, J. That statute, *782] as *was remarked by Lord LYNTHURST, C., (b) contains a provision for some cases of abatement by the death of parties. (c) The case shows that the writ by journeys-accounts is at least *quodam modo* a continuance of the former writ, as it is called in *Spencer's* case, 6 Co. Rep. 9 b, the resolutions in which are a strong authority in favour of the demandant. The effect of that case is, that nothing could be vouched that had occurred after the first writ was purchased. It is there said, "and regularly a writ of journeys-accounts doth not lie, but between those who are parties to the first writ; as where one of the plaintiffs dies, or one of the defendants; (d) but in no case where there is a sole plaintiff or demandant, and he dies; there his heirs or executors shall never have a writ by journeys-accounts, although it be in *quare impedit*, where the death after six months is peremptory." (e) The latter passage will be relied upon by the other side; but the authorities *783] cited by Lord COKE support *the first proposition, not the second. (g) [CRESSWELL, J. A case in Bro. Abr. tit. *Journeys Accomptes*, pl. 3, (h) bears out the statement of Lord COKE, that a writ cannot be sued out

abated, or as such as did avow, or make cognisance, title, or claim, or prescription, should or might have done, had, used, made, or enjoyed in the said former action or suit, any thing in this act to the contrary, notwithstanding."

(a) *Scire facias* was brought, anno 36 H. 8, upon a recovery had by the ancestor in a writ of formedon, brought anno 12 R. 2, and the demandant says, that all those that were tenants of the land were dead since the recovery, and that the land in demand is in the hand of the now tenant; and afterwards, by the demise of the king, (Hen. 8,) the writ of *scire facias* was abated, and the demandant purchased a new *scire facias* by journeys-accounts; and if this second writ is good or not, was the question.

Morgan—This second writ is not good; for the plaintiff is barred from having this by the statute of prescription, made anno 32 H. 8, inasmuch as the plaintiff here supposes the recovery in the time of R. 2, by which recovery the plaintiff can not claim at this day, because he has passed his time by the statute; for the statute is, that he shall be barred to claim any lands entailed, if neither he nor his ancestors were seised within fifty years, or unless he made a claim before the year 38 H. 8; and this plaintiff brought his writ according to the statute, and within the time limited, and this was good; but when this writ abated by the demise of the king, he could not have another writ; for the best words to aid him in the statute are, to wit, if any plaintiff or defendant dies, that the writ shall be purchased by journeys-accounts, and no party shall be prejudiced; but the case here is not within the compass of the statute; and therefore, if one had brought before the year 38 H. 8, a writ, and this had been abated for false Latin, and the plaintiff, after the year 38 H. 8, had purchased another writ, and his time by the statute had passed, this latter writ should abate; so here.

Montague and *Broune* said that the writ was good enough.

Shelley and *Hinde* said, that if the re-summmons be sued out of the first *scire facias*, it is good enough.

(b) Vide antè, Vol. VI. p. 532.

(c) Vide 32 H. 8, c. 2, s. 10, antè, Vol. VI. 532.

(d) Citing 8 E. 3, 428, and 10 E. 3, 498, (Qu. as to these references, there being no such folios in either edition); 8 H. 5, 6 a, (H. 8 H. 5, fo. 6, pl. 22); 7 H. 6, 17, (*Marbery's* case, M. 7 H. 6, fo. 16, 17,) and 24, 25, (M. 7 H. 6, fo. 24, pl. 7); 15 E. 3, Fitzh. Abr. *Journeys Accomptes*, 14; 43 E. 3, 16, (P. 43 E. 3, fo. 16, pl. 17. Vide antè, Vol. VI. p. 529); 40 E. 3, 22, (M. 48 E. 3, fo. 22, pl. 4); 33 H. 6, 3, (*Siede v. Erdington*, H. 33 H. 6, fo. 3, pl. 11); 21 H. 6, 46, (P. 21 H. 6, fo. 46, pl. 23, *Abbot of Torr v. Tonnington*.)

(e) Citing 19 E. 2, Fitzh. Abr. tit. *Darrine Presentment*, pl. 21; F. N. B. 32, C.; 10 E. 3, 16, 17; (*Dionise la Rivere's* case, P. 10 E. 3, fo. 16, pl. 8; suprà, p. 776.)

(g) Vide 12 Mod. 570, 576, 577.

(h) "Dower. The tenant dies: the demandant brings another writ of dower; and she shall not have advantage of journeys-accounts in the new writ. 7 H. 6, 34." P. 7 H. 6, fo. 34,

by journeys-accounts in the case of the death of a sole tenant.] That is the only authority in support of that proposition. It appears, from *Spencer's* case, that the costs of the first writ may be recovered; which would be strange if the second writ were not a continuance of the first. [TINDAL, C. J. It is said there that the alleging of journeys-accounts is always by way of counterplea, or of replication. Here, it appears in the count.] (a) It must of necessity do so. *Berrington's* case, Litt. Rep. 164, (b) shows that where a writ is sued out by journeys-accounts, the original writ is revived, but not all the proceedings in the cause. In *Dayrell and Thinn's* case, 1 Leon. 22, Dayrell brought a writ of error against Sir John Thinn upon a judgment had by the defendant against the plaintiff's father, of the manor of Meyden; and error was assigned, for want of warrant of attorney. Sir John Thinn dying, the plaintiff brought another writ of error, by journeys-accounts, *against John Thinn, son and heir of the said Sir John Thinn; and no ob- [*784]jection was taken to this course. In *Kinsey v. Heyward*, *suprà*, 774, 8, *infra*, 785, which was an action of assumpsit by an administratrix against an executor, to which the statute of limitations was pleaded, it appeared that an original writ was sued out by the intestate against the testator, and after his death another writ was sued out by the intestate against the defendants; and one of the principal questions in the case was, whether, upon the death of the intestate, the plaintiff could sue out a new writ as by journeys-accounts, so as to avoid the statute of limitations. It was held in the Common Pleas that she could; and though that judgment was afterwards reversed, (c) it was upon another point, namely, that there was no entry of continuances on the record. (d) In *Elstob v. Thorowgood*, 1 Ld. Raym. 283; 1 Salk. 393; Comb. 428, it was held, that an executor may have a writ by journeys-accounts, in respect of an action commenced by a

pl. 33. There the writ abated for false Latin; but 14 H. 4 is referred to as deciding as above. But in the only case of dower and journeys-accounts in 14 H. 4, (H. 14 H. 4, fol. 22, pl. 28,) that point did not arise. See 14 Vin. Abr. tit. *Journeys-Accounts*, (B.) 9.

(a) Vide *suprà*, p. 764.

(b) "Berrington and his wife brought a writ of dower against seven persons, who had all, several delays; one of the defendants dies; whereby the whole writ is abated, as appears by 45 E. 3; wherefore they brought a new writ, by journeys-accounts. And Barkeley moves that they could not have their delays again, because the first writ is revived; and he cites *Spencer's* case, Co. Rep. 6, 10; but it was resolved, *per totam curiam*, that only the original is revived, and that the defendants may have their essoin in any delay again; and so, per Moyle, prothonotary, it had been resolved as to the essoin, in this court [C. P.] before, in a Kentish case."

(c) 12 Mod. 568.

(d) The case was secondly argued in error. On the first occasion, Holt, C. J., said, "It is plain journeys-accounts will not lie in this case; for the rule is, that it must be between those that were parties to the first suit. And, besides, the new writ is to be the same with the former; and the writ that lay for the ancestor, or for the testator, is not the same that lies for the issue or executor, but one of another nature. If an assise be brought within twenty years after a dissisin, and, before judgment, twenty years pass, and then the demandant dies, the heir cannot have another assise, but he must have a writ of entry; and it will be hard to prove the heir can proceed by journeys-accounts in that case; for it is another writ he is entitled to now by the death of his ancestor; yet still he may be out of the statute of limitation." 12 Mod. 572 And, on the second occasion, his lordship said, "A journeys-accounts was a common law writ and though a journeys-account properly did not lie here, being not between the same parties and it were hard not to allow a revivor of the first writ now in such cases as this." *Ib.* 578.

*785] temporary executor ; (a) though he could not, in respect of an *action commenced by a temporary administrator. In a note by Serjt. Hill, in Booth on Real Actions, page 32, n. (o), it is said, "The writ by journeys-accounts is a continuance of the first writ ; for the demandant shall have the costs of the first writ, and must be in the same court where the first writ was, of the same quantity, and, *if it can*, between the same parties." (b) In *Wilcox v. Huggins*, Fitzg. 170, 289, 2 Stra. 906, 1 Barnardiston, 335, 349, 382, 2 Barnardiston, 5, 15 Vin. Abr. tit. *Limilation*, p. 103, LEE, C. J., described a writ by journeys-accounts as "a taking up and pursuing of the old action in a reasonable time." (c) In Bro. Abr. tit. *Journeys-Accompts*, and 14 Vin. Abr. tit. *Journeys-Accompts*, (B.) 11, (D.) 2, 4, 5, (E.), there are several authorities which show that the writ by journeys-accounts is a continuance of the former writ ; as where the former writ was abated by wager of law of non-summons. (d) The passage cited *786] and relied *upon by LYNDHURST, C., from Brooke's Reading on the Statute of Limitations, (32 Hen. 8, c. 2,) pp. 154, 155, (e) do not affect the general doctrine of journeys-accounts ; they are only applicable to that particular statute ; and, moreover, the work is a very doubtful authority ; it is only a reading in one of the inns of court, and the author was probably at the bar when he composed it. Besides, it was written before the case in Dalison, (g) where the very argument relied upon in Brooke was urged in vain. In the judgment in *Till-Adam v. The Inhabitants of Bristol*, 2 A. & E. 389, 404, S. C. 4 N. & M. 144, the distinction is pointed out between the applicability of the doctrine of journeys-accounts to the case of the death of a sole plaintiff and to that of the death of a sole tenant.

But the question before the court is not so much whether the writ by journeys-accounts can properly be sued out under the circumstances of this case, as whether the court can so decidedly say that it cannot, as to interfere and prevent the cause from proceeding, and the point from being solemnly argued upon the record. The rule is, that the count in a writ of

(a) So, an executor *durante minoritate* ; the reason, as stated by Treby, C. J., being, that the executorship, in such case, is but an office, both parties making but one executor.

But afterwards, in *Kinsley v. Heywood*, 1 Lord Raym. 432, his lordship, referring to this case, said, "that he was then of that same opinion ; but he never was ashamed to retract his opinion, when he is convinced upon better reason ; and for this reason he declared that he thought the said judgment was not maintainable, upon the reasons upon which it was given, viz., that an executor may have a writ by journeys-accounts upon a writ abated, brought by the executor *durante minoritate* ; but the judgment was, notwithstanding, well given upon other reasons. But in no case can a writ of journeys-accounts be, but by the same plaintiffs, or some of them, who were plaintiffs in the former writ. And to say, that the general executor, and the executor *durante minoritate*, were as one person in the office, is to strain the point too far ; for it must be the same plaintiff, not only by representation, but by name ; for the second writ is a continuance of the first, which cannot be but by the same person, not only in representation, or in respect of their office, but strictly and truly the same person."

(b) Citing 6 Co. Rep. 10 b, (*Spencer's case*.)

(c) Fitzg. 290.

(d) Where the sheriff returned that the defendant had been summoned, and the latter came with his *compurgators*, and swore that he had not been summoned. Vide *Termes de la Ley* tit. *Ley*.

(e) Vide *antè*, Vol. VI. pp. 532, 533.

(g) *Suprà*, p. 780, 784, note (a).

right must show a seisin within sixty years; and the count here will be bad upon demurrer unless it conforms with that rule. The court will not decide a point properly to be raised by demurrer, upon a motion to stay proceedings; especially after plea. The cases of *Leigh v. Leigh*, 2 N. C. 464, 2 Scott, 666, 668, 4 Dowl. P. C. 650, and *Foot v. Collins*, 2 Mylne & Cr. 250, have no application to the present. It was there held, that resealing an original writ was the same thing as issuing a new writ; and in the former case this court set aside the service of a writ of summons grounded on an original writ of right, which, though *sued out before the 31st of December, 1834, had been resealed after that time. If the court [787 had given effect to the writ under such circumstances, the consequence would have been, that the writ would appear to have issued at one time, when in fact it issued at another. In *Foot v. Sheriff*, 2 N. C. 528, 2 Scott, 806, 4 Dowl. P. C. 652, this court, upon a motion to set aside a writ of right and summons, on the ground that the writ had been resealed after service of the summons, refused to interfere, as having no jurisdiction, the writ not having been returned. In that case, TINDAL, C. J., said, the court of Chancery was the proper tribunal to apply to, which was done accordingly, and the writ of right having been there set aside, this court then set aside the *grand cape*; (a) but here, the court of Chancery has refused to set aside the original writ.

Sir T. Wilde, Serjt., Kelly, and Gray, (with whom was F. Bayley,) in support of the rule (13th of April, and 4th of May.) The first application to this court in *Foot v. Sheriff*, related to the initiatory process, which was the proper subject of an application to the court of Chancery: as the writ issuing under the great seal, this court could not set it aside. But if the court see that that writ cannot be carried into effect, they are bound to try the subsequent proceedings, as was done in *Leigh v. Leigh*. In that case, setting aside the service of the writ of summons, put an end to the action. That was an application precisely analogous to the present. There, the writ was regular upon the face of it; and the facts were brought before the court by affidavit; but here, the writ is irregular; as it appears to have issued after the period limited by the 3 & 4 W. 4, c. 27, s. 36. By that statute, the writ of right—not merely the *action—is abolished. [788 There no longer exists any competent authority to issue it. Suppose the sheriff had refused obedience to the writ—could the court have attached him? The writ is of no more authority than a writ of latitat, or a bill of Middlesex, which have been virtually abolished by the 2 & 3 W. 4, c. 39, s. 1; and being void, the proceedings under it would not be judicial, and perjury could not be assigned in respect of any thing stated at the trial. [CRESSWELL, J. You would put it as though the statute had said, the court of Common Pleas shall not henceforward try a writ of right. COLTMAN, J. Or you may consider it as though a writ issued out of the court of Chaucery, commanding *this* court to try a man for murder.]

(a) *Foot dem. Shireff*, 2 Scott, 813, 5 Dowl. P. C. 63.

which cases the whole proceedings would obviously be *coram non judice*. In the thirty-sixth section the word *writ* is used as the process by which the action is commenced; the language of the thirty-seventh and thirty-eighth sections is to the like effect. (a) *Foot v. Collins*, 2 Mylne & Craig, 250, was decided upon the same principle. *Bradley v. Warburg*, 11 M. & W. 452, is a further illustration of it. By a private act of parliament, 4 & 5 Vict. c. 89, incorporating the Patent-rolling-and-compressing-iron Company, it was provided that every judgment against the nominal defendant might be executed against the person and estate of every shareholder, provided "that no such execution should issue without leave first granted by the court in which such judgment should have been obtained, upon motion in court, and after notice of motion:"—and it was held, in that case, that the fact of the *scire facias* having issued without the leave of the court, could *789] not be pleaded as a defence *in bar of the action, but was an irregularity merely, in respect of which an application might have been made to the court to set aside the writ.

The Lord Chancellor's opinion in this case was obviously very strong,—that the writ could not issue by journeys-accounts; but his lordship seemed to wish that the question should be raised by demurrer. (b) If, however, the tenant has a good answer to the writ upon the merits, it seems hard that he should be driven to peril his case upon the issue of a demurrer. [CRESSWELL, J. The argument on the other side may be put thus:—The statute prevents the commencement of an action by a writ of right; but this is not the commencement of an action; it is merely the continuation of a former action.] In fact it is a commencement; the statute says no writ of right shall be brought, &c. Is not this bringing a writ? The second writ is, word for word, the same as the former one. When a writ is abated, it is determined. Under certain circumstances a new writ may be brought; but it cannot be a continuation of the former writ, which is at an end. If it were a continuance, there would be entries on the record to show it; but there is no precedent to that effect. Where a party sued out a writ by journeys-accounts he could not avail himself of the old essoins in the writ, but he might of the new ones. *Plene administravit* and *non-tenure* had always to be pleaded with reference to the time of the first writ, treating it as distinct from the second writ. The writ by journeys-accounts is spoken of in *Termes de la Ley* as "a new writ;" and it is said "this second writ shall be *as a continuance* of the first" upon the authority of *Spencer's* case, where it is called *quodammodo* a continuance. So, in *Walthall v. Aldrich*, *790] Cro. Jac. 588, 2 Roll. Rep. 186, 204, 209, *is said to be "*quasi* a continuance of the former writ." Later writers, such as Serjt. Hill in the note to Booth on Real Actions that has been referred to, have left out the qualifying term for the sake of brevity. The reason why the

(a) *Quare*. In both these sections mention is made of the right "to maintain any such writ or action."

(b) *Vide antè*, Vol. VI. p. 535.

costs of the former writ were given in the second writ, was because it was between the same parties. This is the mere effect of a rule of court grafted upon the stat. of Gloucester; as at common law no costs were given; Gilb. Hist. C. P. 265; 3 Bla. Comm. 399; *Phillips v. Bacon*, 9 East, 298; and that rule is not at all inconsistent with the second writ being a new one. [CRESSWELL, J. Is there any instance in which an action by journeys-accounts was maintained against the defendant who could not have been made a party to the first writ?] *Dionise la Rivere's* case, 10 E. 3, 16 a, (P. 10, E. 3, fo. 16, pl. 5.) (a) appears to be to that effect, but it is not a very intelligible report. [CRESSWELL, J. The inquiry there seems to have been as to a darrein presentment, which is a very different matter from the present. The question was, who had the right to present at a bygone time?] In several of the older cases, where it is said the action was brought by journeys-accounts, the expression would seem merely to mean that it was brought recently or freshly, inasmuch as in some of the cases the doctrine of journeys-accounts would not apply. There is nothing in the proceeding by journeys-accounts to do away with the abatement of the former writ. The judgments are not vacated or reversed. The new writ contains no reference to the former one. From all that appears upon the present writ, the action may be brought against a stranger; as it does not there appear that the present tenant is heir of the tenant in the former action. The tenant is summoned in the same form, and may have the benefit of essoins as in a new action. The demandant may, and probably must, count **de novo*. (a) The tenant may plead a new defence; [*791 though he is excluded from certain pleas which do not go to the merits of the case, such as non-tenure. [TINDAL, C. J. That is a dilatory plea, which only gives a better writ.] The only instance where the proceeding by journeys-accounts appears to be entered upon the roll, is in *Rast. Ent.* 107, which was a writ of error, where, of course, the entry must have been made on the roll of the judgment that was sought to be reversed. In the *Y. B.*, 7 H. 6, 16, 22, (b) there is a case upon **the* [*792

(a) *Suprà*, p. 776, n. 'i)

(b) In *Anon.* 12 Mod. 229, Treby, C. J., says, "In journeys-accompts you shall never change your count; and the old way of journeys-accompts was to pray a new writ, and then to proceed on the former roll."

(c) The case was before the court in *M.* and in *P.* 7 H. 6. The latter report—from the first edition of the *Year-Books* (being misprinted and unintelligible in the *second*) is as follows:—

Formedon was brought by a daughter, as heir to her father. The tenant says that he was not tenant the day of the writ purchased, or ever afterwards. To which she says, that formerly the same now demandant, and another, her coparcener, brought such a writ against this same now tenant, and afterwards her coparcener died, and she brought this writ freshly by journeys-accounts: with this, that she will aver that the tenant was tenant of the freehold after the death of the ancestor of whose seisin, &c., and that he aliened and took the profits at the day of the first writ purchased, and that the first writ was purchased within the year after the title had accrued to them; and demands judgment if the writ be not good enough. And the tenant says, forasmuch as the non-tenure is not denied, neither to the matter alleged, is there any law to put him to answer.

Newton, [Serjt.].—It seems to me that the writ is good; for at one time the demandant and her coparcener had a good writ against the now tenant, and her coparcener is dead without issue

stat. 4 H. 4, c. 7, (a) where a woman brought formedon, as heir to her father, and the tenant pleaded non-tenure the day of the writ purchased, nor ever *after, the demandant counterpleaded that her father was
*793] seised in tail, and had issue the demandant and a sister, and after

of her body, such death shall not turn to any prejudice of the demandant, forasmuch as it is not her default, but rather the act of God: so it seems to me that this writ, purchased freshly, is a continuance of the first writ, and the tenant shall stand tenant to this writ, as well as to the first writ. And in case she who is dead had had issue, the issue and the other (sister) should have had a good writ against this now tenant, and should have had advantage of the first writ.

Cokein [*Cokayn*, J. C. P.]—If the ancestor brought formedon against a tenant who aliened pending the writ; still, as against him, he remains tenant: but if the demandant dies, although the issue purchases a writ freshly, he shall have no advantage from the user of the writ by his ancestor; no more here. The first writ was brought by two coparceners, and one is dead without heir of her body: so by her death a new title of the entirety has accrued to the demandant, and at the time of this title accruing the tenant was not tenant in fact, nor pernor of the profits; so not within the case of the statute, (1 R. 2, c. 9, *infra*, p. 794, n. (a).) which gives the averment tendered, &c., (in the above counter-plea.)

Strange. [*Strangways*, J. of C. P.]—If a husband and his wife bring a writ, as in the right of the wife, against one who is tenant by form of the statute, which writ pends a year and a day, suppose that the husband dies, his wife shall have a new writ, and shall have the advantage of the statute; so here; vide the other term, (M. 7 H. 6.) he was in *contrariâ opinione* *ideo* resorser. (qu.); and he said at common law, if one wished to have the advantage by journeys-accounts, it is necessary that the tenant was tenant the day of the first writ purchased; and then, if the writ abated, and not by the default of the demandant, and he purchased a new writ, the tenant shall not allege non-tenure or joint-tenure; but you are not in that case; for the tenant was not tenant at the day of the first writ purchased, so you cannot maintain this writ by the common law, nor by the statute; for the statute requires that he be tenant who was tenant the day of the dying of the ancestor, and pernor of the profits the day of the writ purchased, and that your writ be purchased within the year after the title has accrued to you. And if you take your title by the father, then your writ is not purchased within the year after: .ne title has accrued to you; and if you take your title by the death of your sister, then he was not tenant after the death of your sister; so that whether you claim title by the one or by the other, one branch of the statute fails you, and neither by the common law can your writ be maintained, *causâ quâ supra*; so, it seems to me that the writ shall abate.

Chant. [*Chauntrell*, Serjt.]—If two parceners bring a writ against him who is tenant in fact, and afterwards one dies, and the survivor brings a new writ, and the tenant alleges non-tenure, you will not deny that the demandant shall maintain his writ, if he will aver that the tenant was tenant the day of the first writ purchased; and this is by common law. And in like manner, as in the case that I have put, the tenant was tenant in fact the day of the first writ purchased, so was the now tenant in our case, the day of the first writ purchased, tenant in law by the statute, so that by the statute we are aided (enabled) to aver, that he was tenant by the form of the statute the day of the first writ purchased. And as to the rest, namely, that this writ is freshly purchased by journeys-accounts, we are warranted by the common law; so we have the common law and the statute *simul*, and we are in the same case that I have put before, which was at common law: so the writ is good.

Newton. If the first writ had been brought by one demandant against two tenants, who were tenants in law by the statute, and afterwards one had died, and the demandant had purchased a new writ against the survivor, and he had alleged non-tenure, the demandant might have ousted him by saying that he was tenant in law the day of this *first* writ purchased: and the cases are like, unless it seems to you that by the death of the sister, a new title has accrued to the demandant; and it seems to me that this shall not change the case, because the tenant was not tenant in fact: so not within the case of the statute: and it seems to me that this shall not aggrieve us; for another title shall not be intended in us, nor can we have claimed any other title than is comprised in our writ and our count; and that is, that we claim as heir to our father, and claim nothing as heir to our sister. But if we had made the descent by our sister, peradventure it might have been otherwise: as in the case that the tenant in tail has issue two sons and dies, and a stranger abates, and makes a feoffment, and continually takes the profits, and afterwards the eldest son dies without issue of his body: if the younger son brings formedon against the abator, and makes the descent from his brother, the writ shall

the death of the father, the daughter *brought *formedon* and the sister died, and then the demandant brought their writ freshly by journeys-accounts, and averred that the tenant was tenant at the *time of the first writ purchased; and, after long argument, the writ was

[*794]

[*795]

abate; for the abator is not tenant after the title had accrued to him, namely, after the title comprised in his writ. But if he bring his writ against the abator as heir immediate to his father, without making mention of his brother, the writ is good: so here.

Rolfe, (Serjt.) If a *præcipe quod reddat* be brought by two, as daughters and heirs, and one has issue, and dies, and the issue and the other brings a new writ, the tenant shall well say that *he was not tenant the day of the writ purchased, nor ever afterwards*; and although the demandants tender an averment that he was tenant the day of the first writ purchased, that is not to the purpose; for the other (the surviving demandant) is in this case to have advantage by the statute, and not by journeys-accounts; and the issue is out of that case, for she was not a party to the first writ, and it is necessary for them to join in the action; and therefore it is necessary for them to bring such a writ, in which they may join, and that is—to have a writ against him who is tenant in fact. So here, as to the moiety, this now demandant was a party to the first writ, and as to the other moiety she was not party: for although the law will not compel her to make herself heir to her sister, still, in fact, the title of the moiety has accrued to her by the death of her sister and as her heir; for if her sister had a nearer heir, she should not have an action for this moiety: *ergo*, the heir shall not have advantage by journeys-accounts, of the writ brought by her aunt; and, having regard to the moiety, she brings her writ as heir, and not as she who was party. And so it seems to me that as to that she shall not have the advantage, as if she had been a party *simul*.

Chaunt. It seems to me that the aunt and the issue shall have advantage by journeys-accounts; for although the one is in the case, and the other without, it shall be taken most for the advantage of the demandants; as if the reversion of a tenant for term of life be granted to two and the heirs of the one, in that case one may have a writ of *waste*, and the other not; yet, for the advantage of the one who may have the action, they shall join: so in your case.

Babington (C. J. of C. P.) If it be as Chauntrel has said, the reason must be this,—that the aunt and the issue cannot sever, forasmuch as they demand of the same seisin: where, as in the case at the bar, there is but one demandant: and therefore if she will have the advantage of the statute, it is necessary for her to have several writs: and as to the moiety, to which she was a party at first, it is reason that she shall have the benefit of the statute, and not as to the other. And the writ at another day was awarded good in all, &c. *Quod nota.*"

In Bro. Abr. tit. *Journeys-Accounts*, pl. 12, the case is shortly stated; and Newton is there made to say, "Where a man brings an action and dies, whereby the writ abates, his heir shall not have a new writ by journeys-accounts; for it seems that none shall have an action by journeys-accounts but one who was a party to the first writ, and against him who was a party to the first writ." 7 H. 6, 16, is referred to; but the passage is not in the Year-Book. The sentence appears to have been uttered by Newton *arguendo*; but in Vin. Abr. tit. *Journeys-Accounts* (C), 3, it is referred to as an authority.

(a) The argument in the case seems rather to have turned upon the 1 R. 2, c. 9, which is referred to in the Y. B., 7 H. 6, 16, in marg.

By that statute, after reciting that "it is complained to the king that many people of the said realm, as well great as small, having right and true title, as well to lands, tenements, and rents, as in other personal actions, be wrongfully delayed of their right and actions, by means that the occupiers or defendants, to be maintained and sustained in their wrong, do commonly make gifts and feoffments of their lands and tenements which be in debate, and of their other goods and chattels to lords and other great men of the realm, against whom the said pursuants, for great menace that is made to them, cannot, nor dare not, make their pursuits: and also on the other part complaint is made to the king, that oftentimes many people do disseise others of their tenements, and anon after the disseisin done, they make divers alienations and feoffments, sometime to lords and great men of the realm to have maintenance, and sometime to many persons of whose names the disseisees can have no knowledge, to the intent to defer and delay, by such frauds, the disseisees, and the other demandants and their heirs, of their recovery, to the great hinderance and oppression of the people: It is ordained and established, that from henceforth no gift or feoffment of lands, tenements, or goods be made by such fraud or maintenance; and if any be in such wise made, they shall be holden for none and of no value; and the said disseisees shall from henceforth have their recovery against the first disseisors, as well of the lands and tenements, as of their double damages, without having regard to such alienations, so that the disseisees commence their suits *within the year* next after the disseisin done. And it is ordained and established, that the same statute shall hold place in

held good, upon the ground that the demandant claimed, and took her estate, as heir to the *father, and not under her coparcener. That *796] case was brought within the statute under discussion; but here the object sought for is to take this case out of the limitation act. The effect of the statute 32 H. 8, c. 2, is that a title is to be pronounced upon a seisin of sixty years; but the remedy is not to be affected. The stat. 3 & 4 W. 4, c. 27, affects both title and remedy, for it prohibits the action altogether. The case in Dalison, p. 3, was a *scire facias* on a judgment, and therefore not within the 32 H. 8, c. 2. A *scire facias* on a judgment is a judicial writ, and the proceeding by journeys-accounts is applicable only to original writs; Fitz. Abr., tit. *Journeys-Accomptes*, pl. 17.(a) As to the cases in *quare impedit*, that form of proceeding is subject to peculiar considerations; and, in order to prevent a failure of justice, rules have been framed with regard to it, which are applicable to no other action. Thus, in Co. Lit. 198 a, it is laid down; "If two tenants in common be of an advowson, and a stranger usurp, so as the right is turned to an action, and they bring a writ of *quare impedit*, which concerns the realty, the six months pass, and the one dieth, the writ shall not abate, but the survivor shall recover; otherwise there should be no remedy to redress their wrong. And so it is *797] of *coparceners." And again, in the *Cases of quare impedit*, 7 Co.

Rep. 25 b, 26 b, it is said, "A *quare impedit* well brought by divers, as coparceners, or joint-tenants, &c., shall not abate by the death of one of them, nor a *quare impedit* brought by the husband and wife shall not abate by the death of the wife, because otherwise the plaintiff (if the six months be past) would be without remedy."

[*Talfourd*, Serjt., referred to the 3 & 4 W. 4, c. 27, s. 38, to show that the writ of right was not completely abolished; and also to *Doe dem. Gilbert v. Ross*, 7 M. & W 102; where, by a will, in 1789, an estate was devised to A. G. M. for life, with remainder as he should by deed or will appoint, and, in default of appointment, remainder to the heirs of his body,

every other action in (or) plea of land where such feoffments be made by fraud or collusion, to have their recovery against the first such feoffor. And it is, to wit, that this statute ought to be understood where such feoffors thereof take the profits."

By the stat. 4 H. 4, c. 7, after partly reciting the former act, proceeds: "Our said lord the king, thinking the said statute to be very mischievous and prejudicial to his people because of the shortness of the time, by the assent of the said lords, and at the request of the commons aforesaid, hath ordained and established, that such disseises shall have their action against the first disseisor during the life of the same disseisor, so that such disseisor thereof take the profits at the time of the suit commenced: And as to other writs in plea of land, the demandant shall commence his suit within the year against him which is tenant of the freehold at the time of the action accrued to him, so that such tenant thereof take the profits at the time of such suit commenced, notwithstanding the said statute."

(a) *Scire Facias*: the tenant says that the land was given to him for term of life, the remainder to the right heirs of one John, whose heir is within age; and we pray aid of him, and that the parol may demur during his nonage; the demandant said that he formerly brought such a writ, which writ was variant from the record; and this writ was purchased by journeys-accounts, and he of whom you pray (aid) had nothing at the time of the first writ brought: judgment, if the aid, &c. Wilby. (Wylughby,) Justice of C. P.) Journeys-accounts lies not in such writs, but in original (writs); wherefore, &c., M. 27, E. 3, 84, (of the first edition of the Year-Books, M. 27, E. 3, fo. 8, pl. 23, of the second edition.)

with remainders over: in 1790 A. G. M. levied a fine to the use of himself in fee, and afterwards died without issue:—and it was held in an ejectment, where the lessors of the plaintiff claimed as heirs-at-law of A. G. M., that the fine created a discontinuance, and gave a tortious fee to A. G. M., and that his heir-at-law was consequently entitled to recover in ejectment, the remainders over being divested, and the rights of the remainder-men only capable of being enforced by real action: and that in such a case the statute 3 & 4 W. 4, c. 47, s. 38, preserved the right of the remainder-men to bring a *formedon*.]

[TINDAL, C. J., suggested that, as the third plea raised the question, as to whether the action was brought in time, it might be a convenient course to withdraw the mise and the pleas pleaded with it, leaving the question to be argued upon demurrer to the third(a) plea, upon an understanding that if the determination of the court *were against the tenant, issue might afterwards be joined upon the general mise.(b) This *Tal-* [*798
fourd, Serjt., declined.] *Cur. adv. vult.*

Gray, in last Trinity term, (12th of June,) showed cause against the rule obtained on the part of the demandant(c) for rescinding the order, allowing the tenant to plead the special pleas together with the general mise. The ground upon which it is sought to rescind the order is, that as the issue upon the general mise must be tried by the grand assize, and the other issues by a jury, there would be separate modes of trial. But that is no valid objection. Writs of right are already within the 4 Ann. c. 16, s. 4, which empowers the court to allow several pleas. In *Anderson v. Anderson*, 2 W. Bl. 1157, where, in dower, leave to plead *ne unques seisie* and *ne unques accouple*, was denied, the reason given was, that the two pleas would be tried in two several jurisdictions—by the jury and by the certificate of the ordinary.(d) Here, the issues would be tried before the same judges. *Harding v. Harding*, 1 Com. Rep. 148, cited in Com. Dig. tit. *Pleader*, (E. 2,) is to the same effect; and these cases seem opposed to *Robins v. Crutchley*, 2 Wils. 118, 122, 127. [MAULE, J. The grand assize might find one way, and the jury another Can you not prove all you wish to put in issue by these special pleas under the general mise? The fine set up by the second plea has already been so proved.] In *Hardman v. Clegg*, Holt, N. P. C. 671, issues joined upon the general mise, and also upon special pleas, were tried by the same jury; and the same thing was recently done in a writ of right tried at Lancaster. [TINDAL, C. J. That was by consent in both cases.] The difficulty was also *got over [*799
by consent in *Tissen dem. Clarke ten.*, 3 Wils. 419, where the fine and non-claim were given in evidence. The defences raised by the special pleas are all very material. [TINDAL, C. J. You have already got the opinion of this court upon both the former trials, and also of the court of error, that the fine is admissible under the general mise; it cannot there-

(a) Counting the mise as a plea.

(b) The mise appears to form a complete issue *per se*.

(c) *Supra*, p. 773.

(d) *Vide ante*, 753.

ore be necessary to plead that specially. And the defences raised by the third and fourth pleas seem to me also both open to you upon the issue joined on the mere right. The demi-mark being tendered, the demandant must prove a seisin within sixty years.]

Talfourd, Serjt., and *E. V. Williams*, (with whom was *Willes*,) in support of the rule. The pleadings in a writ of right are not in the nature of ordinary pleadings; and though the court may permit various pleas under the 4 Ann. c. 16, they will exercise a discretion in doing so, and will not allow pleas which require different modes of trial to be pleaded together; *Anderson v. Anderson*, *Harding v. Harding*. Till lately (a) the trial upon the general mise might have been by battle; Com. Dig. tit. *Battel*, (A. 2;) which would have raised a much greater discrepancy in the modes of trial than in these cases. All the matters that the demandant has pleaded may be proved under the general mise; *Dumday dem. Hughes* ten., 3 N. C. 439, 4 Scott, 209. In *Galton dem. Harvey* ten., 1 B. & P. 192, the court refused to allow the mise joined in a writ of right, to be tried by a jury instead of the grand assize, even though both parties consented.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court. Two rules *800] have been obtained in this action *upon a writ of right, the first by the tenant, calling on the demandant to show cause why the writ of *grand cape* and the sheriff's return thereto, and also the count delivered in this action, and all other proceedings in this court, should not be set aside; the second, on the part of the demandant, calling on the tenant to show cause why he should not elect between the first plea of the general mise and certain other pleas comprised in the rule to plead several matters, and why either the said first plea, or such other pleas, should not be struck out and set aside.

With respect to the first rule,—which involves a question of far more importance than the other,—the facts are, that a former writ of right was sued out on the 6th of December, 1842, by the present demandant and her late husband (who died during the progress of that suit, and whose death was duly suggested on the record) against William Selby Lowndes, Esq., the tenant of the tenements sought to be recovered; that, upon a trial at the bar of the court of Common Pleas, a verdict was found for the tenant, but that, upon a bill of exceptions to the ruling of that court, the court of error awarded a *venire de novo*; that the cause was tried a second time at the bar of the court of Common Pleas, when a verdict was again found for the tenant, and a bill of exceptions was again tendered to the ruling of the court; but that between the date of the second verdict and the argument on the second bill of exceptions, the said W. S. Lowndes, the sole tenant to the writ of right, died. After his death, namely, in Hilary vacation, 1843, the demandant sued out a new writ against the heir, grounding her

(a) Vide 69 G. 3, c. 46.

right to do so upon the doctrine of a writ purchased by journeys-accounts. The tenant shortly afterwards made an application to the Lord Chancellor to set aside the writ so issued, on the ground that, writs of right having been abolished from and after the 31st of *December, 1834, by the statute 3 & 4 W. 4, c. 27, no writ of right could now be issued [801 under any circumstances; and, secondly, that the right of proceeding by journeys-accounts did not hold in case of the death of a sole tenant in the writ. The Lord Chancellor, after expressing an opinion, in terms which it is impossible to misunderstand, that the ground of the objection, declined however to act upon that opinion by quashing or setting aside the writ, on the ground that the same objection might be raised upon the record in an ulterior stage of the proceedings, where it might become subject to the review of the ordinary tribunals of the law.

The same objections have been raised before us upon this application to set aside the count and all the judicial process that has been issued in this court; and, after hearing a learned argument in support of, and against, such application, we have come to the same conclusion as that adopted by the Lord Chancellor, and for the same reason, viz., that, by analogy to the course of practice adopted in this and other courts of Westminster Hall, we ought not, upon a summary application, from which there can be no appeal, to decide upon a question which involves the final determination of the rights of the parties, where the very same question may be raised on the record, and thereby not only the judgment of this court be obtained, but, if thought necessary, the judgment of the court of ultimate appeal.

It is obvious that such is the case; for, the count in the present action necessarily forms part of the record, and that count states on its face that the former writ against the late tenant was issued before the passing of the late statute 3 & 4 W. 4, c. 27; it also recites the count upon the former writ, whereby it appears that the demandant Elizabeth Davies alleged the seisin in Thomas James Selby, deceased, whose heir she *states her- [802 self to be, "within sixty years next before the commencement of that suit;" it also sets forth all the subsequent proceedings in the former action, down to the giving of judgment upon the second writ of error, and then avers the death of the sole tenant in the former writ. The count then states, that, "by reason of the death of the said William Selby Lowndes, the said writ of right and the suit in that behalf became and were abated, and that thereupon, by journeys-accounts, that is to say, within fifteen days next after the giving of the last-mentioned judgment by the said court of Exchequer Chamber, the demandant freshly brought this present suit, wherein she now counts;" and the count, after setting forth verbatim the writ which was last issued, alleges seisin in Thomas James Selby, deceased, whose heir she alleges herself to be, "within sixty years next before the commencement of the said suit, wherein the said Thomas Davies and Elizabeth his wife were demandants, and whereof the present suit is a continuation by journeys-accounts as aforesaid."

It is clear, therefore, that every objection which the tenant intends to raise against the validity of this second writ of right, appears on the record itself; the power of suing a writ by journeys-accounts, where the former has abated by the death of the sole tenant; the power of suing out any writ of right by journeys-accounts after the passing of the statute 3 & 4 W. 4, c. 27; and also the objection that the seisin of the ancestor from whom the demandant claims, is not laid within sixty years next before the *teste* of the writ last sued out, but within sixty years next before the *teste* of the former writ. And it is equally clear that the tenant may either raise his objection to the proceeding, and call for the decision of the court thereupon, at the time of his pleading, by demurring to the count; or he may, at his own *803] option, reserve the objection until after the trial has taken place upon *the merits; at which time the objection to the writ, if well founded, will be equally fatal to the proceedings as at the present time, on the principle that "*debite fundamentum falkit opus.*"

If this mode of deciding the question upon a demurrer had not been open to the tenant; if he had not possessed the power of raising the question, whether the writ was valid or not, before a superior court, except by previously incurring the expense of a new trial; we should have thought it our duty at once to quash the proceedings, and to declare the writ issued in this case, by journeys-accounts, a nullity. But, as the tenant has the opportunity of bringing the question at once before the court, upon the record, as a simple question of law, we think he can have no right to complain, if we decline to proceed summarily, and if we think it right to leave the question open to discussion before the highest tribunal.

Such being the determination at which we have arrived, we nevertheless think it right to explain the ground upon which our opinion is founded, that, in the present state of the law, the writ by journeys-accounts cannot be sued out; in order that the demandant may have the opportunity of determining for himself the expediency of incurring additional expense in a litigation which may turn out, even if favourable to himself on the merits, to be fruitless in the event.

The broad ground upon which we rest our opinion that the present writ by journeys-accounts cannot be supported is, the operation of the statute 3 & 4 W. 4, c. 27, s. 36. By that statute it is enacted that no writ of right, and no other action, real or mixed, (with certain exceptions named in the statute,) shall be brought after the 31st of December, 1834. The words of the act are precise and peremptory; extending to, and comprising, all writs of right whatever, whether originally sued out, or sued out by journeys-accounts, or, which is contended *to be the case before us, *804] sued out by continuance. The question, therefore, becomes this. Is the writ, so newly sued out, another and different writ from that which was first sued out? If it is so, the consequence necessarily follows, that it is not a writ allowed by the law: there is no such writ in existence, no office from which, and no officer by whom, such new writ can be issued.

And that it is a new writ, is the language of all the books. "If a writ abates without the default of the demandant or plaintiff, he may have a *new writ* by journeys-accounts, viz., *per dietas computatus recenter tulit aliud breve*." 6 Rep. 10 b., The expression is a *new writ* and *aliud breve*. In *Termes de la Ley*, tit. *Journeys-accounts*, cited by the demandant, it is said he may purchase a *new writ*. The demandant contends that it is not in substance a new writ, but a continuance of the old writ; whereas, as it appears to us, strictly and properly, it cannot be a continuance, for, it is not issued until after the old writ has abated; and Lord COKE, in his report above referred to, calls it only "*quodammodo* a continuance."

The statute of limitations, 32 Hen. 8, c. 2, expressly gives the power of suing out a new writ in the case of abatement of the former by death, as it expressly enacts "that the demandant, if alive, or his next heir, may pursue an action within one year next after such action or suit abated, and shall enjoy all such advantage to make their titles within the said one year as the demandant in such writ, &c., should or might have had in the said *former action or suit*." From which it appears that the second writ is not a continuance of the first, but that two suits, the former and the latter, are distinct. The statute 21 Jac. 1, c. 16, s. 3, makes a similar legislative provision for the plaintiff bringing a new action within one year next after the judgment for the plaintiff has been reversed by writ of error. And the entire "silence in the statute now under consideration, when these [*805 exceptions are found in the former, leads to the conclusion that the common law cannot introduce such a provision in favour of the demandant; a conclusion to which the two cases referred to in Lord BROOKE's Reading on the former statute, (pp. 154, 155,) affords a strong corroboration; for, in those cases it was held, that, as the statute only made provision for a new writ where the former suit abated by death, the demandant was not entitled to sue out such writ by journeys-accounts, where the former had abated by any other cause, though without the default of the demandant. If, then, where the statute has made actual provision for a new writ in one case, viz., abatement by death, such provision cannot be extended to any other species of abatement, there can be no legal ground for qualifying the general words of the statute of W. 4, by introducing an exception upon which the act is altogether silent.

Without entering into the discussion, whether the doctrine of journeys-accounts applies to the case of abatement by the death of a sole tenant,—which is the case now under consideration,—we have arrived at the conclusion we have before stated; but, at the same time, for the reasons before given, we think the first rule must be discharged.

With respect to the second rule, the question is, whether the tenant's mise upon the mere right can be joined with other pleas which raise questions of fact for trial by an ordinary jury. And we think they cannot be joined together. The mise is not properly a plea, but a defence of a peculiar kind, in which the tenant takes upon him to assert that he has a better

title than the demandant. An inspection of the record set out at the end of the third volume of Blackstone's Commentaries, would show at once how incongruous are the processes for the *trial of the issue in the one case, and in the other. The oath administered to the recognitors of the grand assize, is a different oath from that taken by the jury. The number of the recognitors is different. Many of the issues raised by the pleas are involved in the trial of the mere right; and, if it is supposed for a moment there should be a jury to try the issues, and that the mere right should be tried by the recognitors, great and inextricable confusion would arise, if the jury found one way and the recognitors another. No instance has been pointed out where this has been claimed and allowed as a matter of right. In the writ of right tried at Lancaster, which was referred to as an authority, it appears the issues of fact were tried by the recognitors, by consent. We cannot but think the allowing of such a practice by consent would be greatly inexpedient, and would make any proceeding against witnesses very hazardous.

We cannot, therefore, without any authority being shown, introduce a new practice upon this occasion, which is not improbably the last writ of right that will be tried. We, therefore, think the second rule must be made absolute.

Rules accordingly. (a)

(a) The remedy by journeys-accounts is applicable to personal actions as well as to real actions. But the necessity for resorting to this process in personal actions, is in a great measure obviated by the statute 8 & 9 W. 3, c. 11, s. 7, which preserves personal actions from abatement by reason of the death of one of several plaintiffs or defendants, in cases where the right of action survives to or against the other plaintiff or defendant. And the principal case may be considered as deciding that, in the case of the death of a sole plaintiff or of a sole defendant, resort cannot be had to process by journeys-accounts.

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*KAYE v. DUTTON. June 29.

Assumpsit upon an agreement, whereby—after reciting that one W. in his lifetime, mortgaged certain premises to R. and B. to secure 3500*l.*; that R. and B. required W. to procure the plaintiff to join him in a bond, as a collateral security for that sum and interest; that the defendant had, since the death of W., taken upon himself the management of the estate of W., and had paid to R. and B. 3370*l.*; that the plaintiff had been called upon as surety, and had paid to R. and B. 130*l.*; that the defendant had repaid him 48*l.*, leaving 82*l.* due; that the defendant had agreed to repay the plaintiff the 82*l.* out of the moneys which might arise from the sale of the mortgaged premises, and in the mean time to appropriate the rents towards payment of the same, as the plaintiff had a lien upon the premises for the same; that the defendant had requested the plaintiff to release and convey all his estate and interest in the premises to A. and L., and that he had already done, *reserving to himself a lien on the said property*,—it was witnessed, that, in consideration of the plaintiff's having paid the 130*l.* to R. and B. in part discharge of the mortgage, and in consideration of his having released and conveyed all his estate and interest in the premises to A. and L., and in order to secure to the plaintiff the repayment of the 82*l.*, the defendant undertook and agreed with the plaintiff to pay him the same, with interest, out of the proceeds of the premises when sold, and, in the mean time, to appropriate the rents in liquidation of the same. The declaration then stated that, in consideration of the premises, the defendant promised the plaintiff to perform the agreement; and alleged for breach, that, although the defendant had received rents to a sufficient amount, he had failed to pay:—*Held* that, inasmuch as the declaration did not show that the plaintiff had

any interest in the premises, except that which he reserved, his release and conveyance, though executed at the defendant's request, formed no legal consideration for the promise alleged to have been made by the latter.

ASSUMPSIT. The first count of the declaration stated, that, by a certain agreement or instrument in writing made by the defendant, theretofore, to wit, on the 22d of September, 1836,—after reciting that one Whitnall, in his lifetime, released and assured by deeds of the 30th and 31st of May, 1832, his freehold dwelling-houses and hereditaments at Windsor, in Upper Parliament Street, in Toxteth Park, unto R. Rockliff and H. Bullen, their heirs and assigns, by way of mortgage, to secure the repayment of 3500*l.*; and also reciting that the said Rockliff and Bullen required the said [*808
*Whitnall to obtain the plaintiff to join him in a bond as a collateral security further to secure the repayment of the said sum of 3500*l.* and interest; and also reciting that the defendant had, since the death of the said Whitnall, taken upon himself the management of the estate of the said Whitnall, and had paid to the said Rockliff and Bullen 3370*l.*; and also reciting that the said Bullen and Rockliff had called upon the plaintiff for payment of the said mortgage, *and he was surety* for the said Whitnall in the said bond, and that the plaintiff thereupon paid to the said Bullen and Rockliff the sum of 130*l.* on the 1st of May, 1835; and also reciting that the defendant had repaid the plaintiff the sum of 48*l.*, leaving due to him the sum of 82*l.*, and that such last-mentioned amount the defendant had agreed to repay the plaintiff out of the moneys which might arise from the sale of the said hereditaments and premises when the same should be sold, and in the mean time to appropriate the rents of the said hereditaments and premises towards payment of the same sum, *as the plaintiff had a lien on the said hereditaments and premises for the said sum of 82*l.**; and also reciting *that the defendant had requested the plaintiff to release and convey all his estate and interest* in the said hereditaments and premises to Alison and Lenox, and that *that he had already done*, reserving to himself a lien on the said property as aforesaid—It was by the said agreement or instrument in writing witnessed, that, in consideration of the plaintiff's having paid to the said Bullen and Rockliff the said sum of 130*l.*, in part discharge of the said mortgage, and in consideration of the plaintiff's having released and conveyed all his estate and interest in the said hereditaments to Alison and Lenox, (*reserving to himself the said lien*), and in order to secure to the plaintiff the repayment of the said sum of 82*l.*, he the defendant did thereby for himself undertake and agree *with the plaintiff, his executors, [*809
administrators and assigns, to pay to him or them the said sum of 82*l.*, with interest thereon, out of the proceeds to arise from the sale of the said hereditaments and premises, when the same should be sold, and, in the mean time, and until such sale was effected, to appropriate the rents of the said hereditaments and premises, in liquidation of the said sum so due to the plaintiff as aforesaid; as by the said agreement or instrument in writing, reference being thereunto had, will appear: Averment, that, the

said agreement or instrument in writing being so made as aforesaid, he, the defendant, *in consideration of the premises*, afterwards, to wit, on the said 22d of September, 1836, promised the plaintiff to observe and perform the said agreement or instrument in writing, in all things therein contained and on his the defendant's part to be observed and performed; that, after the said agreement or instrument in writing was made as aforesaid, and before the said sale therein mentioned was effected, to wit, on the 30th of September, 1836, and on divers other days between that day and the commencement of the suit, the defendant received the said rents in the said agreement or instrument mentioned, to a large amount, to wit, to the amount of 2000*l.*, which he could and might and ought, according to the said agreement or instrument in that behalf, to have appropriated in liquidation of, and which were sufficient to liquidate, the said sum of 82*l.* so due to the plaintiff as aforesaid; yet the defendant, disregarding the said agreement or instrument and his said promise, did not nor would, although theretofore, to wit, on the 1st of September, 1839, requested by the plaintiff so to do, appropriate the said rents so received by him as aforesaid, or any part thereof, in liquidation of the said sum of 82*l.* so due to the plaintiff as aforesaid, or pay the same rents, or any part thereof, to the plaintiff on account, or in discharge, or part discharge, of that *sum of money, or otherwise howsoever, but wholly refused so to do, and the last-mentioned sum of 82*l.* is still wholly unliquidated, and wholly due and unpaid to the plaintiff.

To this count the defendant pleaded amongst others two special pleas, to the replications to which he demurred specially. Upon the argument in Easter term last, however, the defendant abandoned the pleas, and objected to the declaration.

Douling, Serjt., for the defendant. Three objections arise on the declaration: first, it discloses no consideration for the promise alleged; secondly, the consideration (if any) is a mere moral consideration; thirdly, the consideration being executed, it can only sustain an implied promise; (a) whereas the promise alleged is a different one, being an express promise.

Construing the declaration most favourably for the plaintiff, it appears that he having become surety for Whitnall, the mortgagor, paid 130*l.* to the mortgagees; that the defendant—who had taken upon himself the management of Whitnall's estate,—had repaid him 48*l.*, and promised to pay him the residue out of the proceeds thereof; and that the plaintiff, at the request of the defendant, released and conveyed all his interest in the premises to Alison and Lenox, reserving to himself *a lien on the property*. This statement of facts does not disclose any consideration whatever for the defendant's promise. The only interest the plaintiff ever had in the premises was the lien, which entitled him, in equity, to stand in the position of the mortgagees. *Copis v. Middleton*, Turn. & Russ. 224. The recital that the defendant had released all his estate and interest in the property, except his

lien, is in effect to say, that he had *released nothing. Possibly the consideration might have been good if it had been alleged that the plaintiff had executed some instrument purporting to convey an interest. In *Wilkinson v. Oliveira*, 1 N. C. 490, 1 Sc. 461, the declaration stated that, in consideration that the plaintiff, at the request of the defendant, had given the defendant a letter written by O., since deceased, by means of which letter the defendant was enabled to, and did, determine controversies, and obtain a large portion of O.'s effects, the defendant promised to give the plaintiff 1000*l.*: and it was held that the declaration disclosed a sufficient consideration to sustain an action on the promise. So here, if the declaration had stated that the plaintiff had executed an assignment, it might have been sufficient; but the only consideration alleged is, the assigning of his interest; whereas he had none to convey. [*811]

Secondly. The only consideration that appears upon the face of the declaration (if any) is a mere moral consideration, to which the law will give no effect. A past consideration will not support a subsequent promise, *Jeremy v. Goochman*, Cro. Eliz. 442; *Barker v. Halifax*, Ib. 741; *Dochet v. Voyel*, Ib. 885. The law does not, in truth, give effect to any but an executory (a) consideration. It may be said that the consideration here is not simply an executed consideration, because it is stated that the defendant had requested the plaintiff to convey. But a mere request is of no avail. *Lampleigh v. Braithwaite*, Hob. 105, Sir F. Moore, 866. The promise alleged and the promise implied by law, must be co-extensive. *Veitch v. Russell*, 3 Q. B. 928, 3 G. & D. 198. [TINDAL, C. J. That case shows that a subsequent express promise will not *convert that into a debt which, of itself, was not a legal debt.] It establishes that an express promise cannot be supported by a moral consideration. [*812]

Thirdly. If the court think that any promise can be implied from the facts stated, it will not be the promise alleged. It is clear that an executed consideration will only sustain such a promise as the law will imply. *Brown v. Crump*, 1 Marsh. 567, 6 Taunt. 300. In *Granger v. Collins*, 6 M. & W. 458, the declaration (in assumpsit) stated, that whereas before and at the time of making the agreement thereafter mentioned, the defendant held the house and premises thereafter mentioned, for the residue of a term of years, and thereupon afterwards, to wit, on, &c., agreed to let to the plaintiff, who then agreed to take of the defendant the said house and premises at a certain rent; and, in consideration of the premises, the defendant promised the plaintiff that he should quietly hold and enjoy the said house and premises during the said term, without any eviction from the parties entitled to the reversion; nevertheless he the plaintiff was evicted by the party entitled to the reversion. The declaration was held bad on demurrer, inasmuch as the plaintiff having declared on the simple relation of landlord and tenant, no such duty as that laid on the defendant's promise arose from that relation. So, in *Hopkinson v. Logan*, 5 M. & W. 241, it was held

(a) i. e. executory in its inception.

that an executed consideration, whereon the law implies a promise to pay on request, (as, upon an account stated,) is not sufficient to support a promise to pay at a future day. PARKE, B., there said: "The promise which arises in law upon an account stated is, to pay on request, and any other promise is nudum pactum, unless made upon a new consideration." ALDERSON, B., said: "The consideration is clearly executed, and the promise which the law implies thereon is, to pay on request. In order to convert that

*813] "promise into a promise to pay at a future day, there must be a new consideration." And MAULE, B., said: "I agree, that an executed consideration is no consideration for any other promise than that which the law would imply; if it were, there would be two co-existing promises on one consideration." Here, the plaintiff must proceed on the promise implied by law; and if the court cannot imply any promise at all, or if it cannot imply the promise laid clearly, the declaration is bad. *Jackson v. Cobbin*, 8 M. & W. 790, 1 Dowl. N. S. 96. In *Roscorla v. Thomas*, 3 Q. B. 234, 2 Gale and D. 508, the declaration (in assumpsit) stated that, theretofore, to wit, on the 29th of September, 1840, in consideration that the plaintiff at the request of the defendant had bought of the defendant a certain horse at a certain price, to wit, 30*l.*, the defendant promised the plaintiff that the horse was sound and free from vice. It was held, in arrest of judgment, that the promise appeared to have been made in respect of a precedent executed consideration; that it must be taken to have been an express promise, but that no express promise on such a consideration, though executed at request, could extend beyond the promise which the law would imply while the consideration was executory; that at the time of the sale the only implied promise was to deliver the horse on request, and that, after the sale, therefore, there was no consideration for the subsequent express promise of warranty.

Channell, Serjt., contra. The declaration is good. The defendant's promise being laid to have been made in consideration of the premises, that is, of all that is stated in the foregoing part of the declaration, it is submitted that the facts alleged disclose a sufficient legal consideration. Admitting that a mere moral *consideration ordinarily will not sustain

*814] a promise, here a legal consideration is apparent. If the defendant had any estate or interest to convey, his parting with it at the defendant's request, would be an ample consideration: and upon this declaration it is not competent for the defendant to say that the plaintiff did not release some interest in the mortgaged premises. Having paid money as surety for the mortgagor, he would stand in his place, and if any interest can be inferred beyond the lien, there is a good consideration. The difficulty arises on the words, "reserving to himself a lien on the said property." The fair meaning of that is, that the plaintiff had given up his lien so far as regarded Alison and Lenox, but preserved it as between himself and the defendant. As to the second point, the rule upon this subject is well laid down in 1 Wms. Saund. 264, n., where it is said that "a past consideration is not sufficient to support a subsequent promise, unless there was a request

by the party, either express or implied, at the time of performing the consideration ; (a) but where there is an express request at the time, it will in all cases be sufficient to support a subsequent promise." Here, what is treated as a past consideration is stated to have been done because of the defendant's request. Cases have been cited to show that the past consideration here stated, does not support the particular promise alleged in the declaration : but those cases are distinguishable ; as, in all of them, the promise implied by law differed widely from that alleged on the face of the declaration. The question how far a moral consideration will support a subsequent express promise, is discussed by Lord DENMAN, in *Eastwood v. Kenyon*, 11 Ad. & E. 438, 3 P. & D. 276. Here, looking at the whole declaration, a sufficient consideration appears for the promise laid.

Cur. adv. vult.

*TINDAL, C. J., now delivered the judgment of the court. This [*815 was a declaration in assumpsit upon a special agreement, to which the defendant pleaded, amongst others, two special pleas, namely, the fourth and fifth pleas, to which the plaintiff demurred ; and the defendant demurred specially to the plaintiff's replication to the third plea. But it is unnecessary to advert to the particular state of the pleadings, as it was admitted by my brother *Dowling*, on the argument for the defendant, upon an objection taken to the fourth and fifth pleas, that he could not support those pleas, and the whole argument before us turned on the sufficiency of the declaration.

Two objections were made to the declaration,—first, that it did not show any consideration for the promise by the defendant ; secondly, that the promise was laid in respect of an executed consideration, but was not such a promise as would have been implied by law from that consideration ; and that, in point of law, an executed consideration will support no promise, although express, other than that which the law itself would have implied. The cases cited by the defendant, viz., *Brown v. Crump*, 1 Marsh. 567, 6 Taunt. 300 ; *Granger v. Collins*, 6 M. & W. 458 ; *Hopkins v. Logan*, 5 M. & W. 241, 7 Dowl. 360 ; *Jackson v. Cobbin*, 8 M. & W. 790, 1 Dowl. N. S. 96 ; and *Roscorla v. Thomas*, 3 Q. B. 234, 2 Gale & D. 508, certainly support that proposition to this extent,—that, where the consideration is one from which a promise is by law implied, there no express promise made in respect of that consideration after it has been executed, differing from that which by law would be implied, can be enforced. But those cases may have proceeded on the principle that the consideration was exhausted by the *promise implied by law, from the very execution [*816 of it ; and, consequently, any promise made afterwards must be nudum pactum, there remaining no consideration to support it. But the case may, perhaps, be different where there is a consideration from which no promise would be implied by law ; that is, where the party suing has sustained a detriment to himself, or conferred a benefit on the defendant,

(a) *Vide antè*, Vol. I. p. 266, n.

at his request, under circumstances which would not raise any implied promise. In such cases it appears to have been held, in some instances, that the act done at the request of the party charged, is a sufficient consideration to render binding a promise afterwards made by him in respect of the act so done. *Hunt v. Bate*, Dyer, 272, and several cases mentioned in the margin of the report of that case, seem to go to that extent: as also do some others collected in Roll. Abr. *Action sur Case* (Q). (a) But it is not necessary that we should pronounce any opinion upon that point; for, assuming it to be sufficiently alleged that the plaintiff released and conveyed his interest *at the request* of the defendant, yet it does not appear that he had any interest which passed by such release and conveyance. The declaration is founded on an agreement which recites that a certain estate had been mortgaged by one Whitnall, since deceased; and that the plaintiff had joined in a bond as a collateral security for the mortgage-money, and had afterwards been compelled to pay off a portion of it; that the defendant had taken upon himself the management of Whitnall's affairs, had repaid to the plaintiff part of the money which he had paid, and had agreed to pay him the residue out of the proceeds of the mortgaged property when sold, and in the mean time to appropriate the rents of the premises to the *817] payment of the same sum as that for which the *plaintiff had a lien on the said premises. Thus far there is nothing to show that the plaintiff had any other interest than this lien. The agreement then recites that the defendant then requested the plaintiff to release and convey his interest to Alison and Lenox, and that he had done so, *reserving to himself a lien on the property as aforesaid*, that is, reserving to himself the only interest that he is shown to have had. The agreement then proceeds to state that, in consideration of the plaintiff having paid the money, and having released and conveyed all his estate and interest to Alison and Lenox, reserving to himself *the said lien*, the defendant undertook and agreed, &c. Now, the payment of the money by the plaintiff would be no consideration for the defendant's promise; and the alleged release and conveyance was again no consideration, for it does not appear that the plaintiff parted with any thing by it. For the plaintiff it was contended, that he must be taken to have parted with his lien on the property, reserving only his right to call upon the defendant to pay the residue still due to the plaintiff, out of the proceeds of the estate, when sold, and, in the mean time, to appropriate the rents to the same object. But we cannot put that construction upon the agreement, which expressly speaks of the lien reserved as the same lien which the plaintiff had before.

Such being in our judgment the effect of the agreement set out in the declaration, the case resembles that of *Edwards v. Baugh*, 11 M. & W. 641. There, the declaration alleged that certain disputes and controversies were pending between the plaintiff and defendant, as to whether the defendant

(a) 1 Roll. Abr. 11; translated, 1 Vin. Abr. 379.

was indebted to the plaintiff in a certain sum of money ; and that thereupon, in consideration that the plaintiff would promise the defendant not to sue him for the recovery of the said sum in dispute, but would [*818 *accept a smaller sum in full satisfaction, the defendant promised to pay such smaller sum. On general demurrer, the declaration was held bad, because it did not allege that any debt was due from the defendant to the plaintiff, or that an action had been commenced for the recovery of any sum claimed. So, in the present case, as the declaration does not show that the plaintiff had any interest in the premises except that which he reserved, it does not appear that his release and conveyance, although executed at the defendant's request, formed any legal consideration for the promise alleged to have been made by the latter. Our judgment must therefore be for the defendant. Judgment for the defendant.

STEAD v. WILLIAMS and Others. June 29.

Where an invention is described in a work publicly circulated in England, a party who afterwards takes out a patent for it is not the true and first inventor, whether he derives his knowledge from such publication or not.

CASE, for an infringement of a patent right.

The first count of the declaration stated, that, before and at the time of the making of the letters-patent and the committing of the grievances first thereafter mentioned, the plaintiff was the true and first inventor of the working or making of a certain invention for "making or paving public streets and highways, and public and private roads, courts, and bridges, with timber, or wooden blocks," and that such invention others at the time of the making of the letters-patent first thereafter mentioned did not use ; that thereupon our lady the now queen, by her letters-patent under the great seal, bearing date at Westminster the 19th of May, 1838, for herself, &c., did give and grant unto the plaintiff his executors, &c., her said majesty's especial license, *&c., &c.: that it was by the said letters-patent, [*819 amongst other things, provided that, if the plaintiff should not particularly describe and ascertain the nature of his said invention, and in what manner the same was to be performed, by an instrument in writing under his hand and seal, and cause the same to be enrolled in her said majesty's high court of Chancery within *four* calendar months next and immediately after the date of the said letters-patent, then the said letters-patent and all liberties and advantages whatsoever thereby granted, should become void, *prout patet* ; that afterwards, and before the committing, &c., the plaintiff did particularly describe and ascertain the nature of the said invention and in what manner the same was to be performed, by an instrument in writing under his hand and seal, commonly called the specification, and afterwards, and within *six* calendar months next, and immediately after the date of the

said letters-patent, to wit, on the 19th of November, 1838, cause the said specification to be enrolled in her said majesty's court of Chancery, but the same was not enrolled in the said court of Chancery within *four* calendar months next, and immediately, after the date of the said letters-patent, in pursuance of the proviso in that behalf in the said letters-patent contained: that, after the making of the said letters-patent and the enrolment of the said specification, and before the committing, &c., by a certain act of parliament made, &c., (a) "for forming and establishing Stead's patent-wooden-paving Company, and to enable the said company to purchase certain letters-patent, and for improving the same," after reciting that the said specification of the said letters-patent was enrolled within *six* months after the date thereof, instead of within *four* months after the date thereof, as provided by the

*820] said letters-patent, it was enacted that *the said letters-patent should, during the remainder of the term of fourteen years, be considered as valid and effectual, to all intents and purposes, as if the said specification so enrolled within *six* months after the date of the said letters-patent had been enrolled within *four* months after the date thereof: Breach, that the defendants, well knowing the premises, but contriving, &c., to injure the plaintiff, &c., after the making of the said act of parliament, and within the remainder of the term of fourteen years by the said letters-patent granted, to wit, on the 22d of June, 1841, and on divers other days, &c., and within that part of the united kingdom called England, unlawfully and unjustly, without the leave, license, consent, or agreement of the plaintiff in writing, under his hand and seal, or otherwise howsoever, in that behalf first had and obtained, and against the will of the plaintiff, *did make, use, and put in practice the said invention*, in breach of the said letters-patent, and against the privileges so thereby granted as aforesaid; and also, to wit, on the several and respective days and times last aforesaid, within that part of the said united kingdom called England, unlawfully and unjustly, without the leave, license, consent, or agreement of the plaintiff in writing under his hand and seal, or otherwise howsoever, in that behalf first had and obtained, and against the will of the plaintiff, *did counterfeit, imitate, and resemble the said invention*; in breach of the said letters-patent, and against the privileges so thereby granted as aforesaid.

There was a second count alleging an infringement of another patent, granted to the plaintiff on the 23d of April, 1839, for "an improved mode or method of making or paving streets or highways and public and private roads, paths, courts, and bridges, with timber, or wooden blocks." This count was abandoned at the trial.

To the first count the defendants pleaded—first, not guilty.

*821] *Secondly, that the plaintiff was not the true or first inventor of the invention in the letters-patent and specification in the first count mentioned, *modo et formâ*.

Thirdly, that the letters-patent and grant of privilege in the first count

mentioned, at the time of making and granting the said letters-patent, were not letters-patent, or a grant of privilege, for the term of fourteen years, of the sole working or making of any manner of new manufactures within, &c., to the first and true inventor of such manufactures, which others, at the time of the making of the said letters-patent and grant, did not use.

Fourthly, that the invention in the letters-patent and specification in that count mentioned was not, at the time of the making and granting of the letters-patent, nor had the same at any time thereafter been, of any use, benefit, or advantage to the public; by reason whereof the rights, &c., by the letters-patent granted, and the prohibitions therein contained, and by the said act confirmed, were, at the time of the making and granting of the letters-patent, and thenceforward had continued to be, and at the several times when, &c., and then, were wholly void and of no effect, and the same are wholly lost to and forfeited by the plaintiff: wherefore the defendants at the several times when, &c., committed the several grievances in the said first count mentioned, as they lawfully might, for the cause aforesaid. Verification.

Fifthly, that the plaintiff did not particularly describe and ascertain the nature of his said invention, and in what manner the same was to be performed, as in the first count he had alleged: concluding to the country.

Sixthly, that, before the making and granting of the letters-patent, to wit, on the 1st of January, 1800, and on divers other days and times thenceforward continually up to the day of the date and granting of the said letters-patent, *the said supposed invention had been and *was wholly and in part, publicly and generally known, used, practised, and published* within, &c., whereby, and by reason whereof, the rights, &c., in and by the letters-patent granted, and the prohibitions therein contained, and by the said act confirmed, were at the time of the making and granting of the letters-patent, and thenceforward had continued to be, and at the several times when, &c., were, and still were, void and of no effect, and the same were wholly lost and forfeited to and by the plaintiff; wherefore, &c. Verification.

Seventhly, that the title and description of the supposed invention in the first count and in the letters-patent referred to, mentioned, to wit, an invention for making or paving public streets and highways, and public and private roads, courts, and bridges, with timber or wooden blocks, was and is in its claim, description, and definition of the said supposed invention, too large, uncertain, inapplicable, inexplicable, inconsistent, vague, and ambiguous, and at variance with the nature of the said supposed invention as described and ascertained by the said instrument in writing under the hand and seal of the plaintiff, and enrolled in the court of Chancery as in the said first count alleged; whereby the letters-patent became and were void and of no effect. Verification.

The plaintiff joined issue on the first, second, third, and fifth pleas, and replied to the fourth that the said invention was and is of use, benefit, and

advantage to the public; to the sixth, that the said invention was not publicly or generally known, used, practised, or published as in the said plea alleged; to the seventh, that the title of the said invention was not nor is too large, &c.

At the trial before CRESSWELL, J., at the last summer assizes at Liverpool, the specification was put in and was as follows:—

*823] “Specification under letters-patent, dated 19th May, 1838, to David Stead, of Great Winchester Street, in the City of London, merchant, of an invention of ‘making or paving public streets and highways, and public and private roads, courts, and bridges, with timber, or wooden, blocks.’

“Now, know ye, that, in compliance with the said proviso, I, the said David Stead, do hereby declare that the nature of the said invention, and the manner in which the same is to be performed, are fully described and ascertained in and by the following statement thereof, reference being had to the drawing hereunto annexed, and to the figure and letters marked thereon; that is to say, the *invention consists of a mode of paving by means of wooden blocks, cut or formed of similar sizes or dimensions*: and, in order to give the best information in my power, I proceed to describe the drawing annexed, which represents part of a road or other similar surface laid down with blocks of wood of hexagonal figure, which figure at once offers the advantage of going together, and also that the lines of junction proceed in varied directions, by which the blocks of wood will sustain each other more securely than if formed of any other figure. I do not, however, confine my claim to hexagonal blocks, as triangular or square blocks placed diagonally, may be used with advantage. And, in order further to secure the blocks from sinking or getting displaced, I employ dowels or pins to each block, as is shown in the drawing, though I do not consider this requisite in all cases. The blocks of wood are to be placed on the earth, or formed with the grain of the wood in a vertical position; and, in applying such blocks as a paving, the surface of the road or other such way, is to be prepared in as solid a condition as possible, and to the figure or intended slopes: and the blocks are successively to be applied, having sand or other fine filling, *824] driving each block up *to those against which it is to rest, having first introduced the dowels or pins; which I prefer to be of oak. The wood should be of a hard and solid texture, such as oak, pine, beech, &c., and the size of the blocks I prefer, for public roads and streets, *about seven to ten inches diameter at top, slightly diminishing to the base, and about nine to twelve inches in height*. And I prefer that the wood employed should be first boiled in tar, or saturated by other suitable material acting as a preservative to the wood; and it will be found advantageous to fill up the interstices between the blocks of wood with melted pitch, or pitch and sand or earth combined, though this is not essential, and I make no claim for such using of pitch and sand or earth.”

The defendants had, in various parts of the town of Manchester, laid

pavement composed of hexagonal blocks of wood, similar in size and character to those described in the plaintiff's specification.

The defence,—which was conducted by a company called The “Metropolitan-patent-wood-paving Company,” the parties employed by the defendant to lay down the pavement in question,—rested mainly on the second plea. Prior to the date of the plaintiff's patent, various modes of paving streets and roads with wood had been the subject of observation and discussion in works of a scientific character published in this country; amongst others, in a letter addressed by Mr. Finlayson to the editor of the London Journal of Arts, which appeared in that work in 1825, and also in two letters addressed by Mr. Heard to the Secretary of the Society of Arts, published in their Transactions of 1833. The London Journal of Arts has a considerable circulation; The Transactions of the Society of Arts are published periodically, for distribution among 800 members, as well as for sale, 1500 copies being printed.

Mr. Finlayson's letter stated as follows:—

*“The subject of roads and road-making having of late occupied a considerable portion of public attention, perhaps you will permit me, through the medium of your useful journal, to suggest a novel method of laying down a roadway, suited to the streets of London and other great towns. The principal material of which I propose to make my road, is wood: but, let not the idea be hastily discarded, because so perishable a material is to be employed, until my views in so doing, and plan of applying it, are fully understood. Many years back I laid down a piece of road of the kind I am about to describe, which has ever since been in use, and remains in good order. I very recently took up a portion of the road for the sake of observing it, when the wood, of which it was constructed, appeared to be as sound, and likely to endure, as on the day when the road was first laid down. My engagements having been in the agricultural line, and in the northern parts of this island, I have not had the opportunity of exhibiting my plans in operation in the metropolis; which I intend to do at an early period. [*825

“The method of making roads adopted by Mr. M^cAdam, is, unquestionably, excellent in its way, and well calculated for open situations; but, in the narrow streets of London and other large towns, where the traffic is incessant, and all descriptions of carriages are constantly rolling over the road in nearly the same tracks, the wear and tear is excessive, and far beyond any thing generally contemplated; consequently, the mud in winter, and dust in summer, will be a nuisance too great to be long endured.

“Conceiving, then, that the public will very soon be convinced that nothing but a stable material will answer for the roadways in the metropolis, I shall dismiss the consideration of M^cAdam's plan, and describe the mode by which I propose to remedy existing evils, *and to form a road that shall be stable, durable, clean, and prevent that astounding [*826

noise which is so extremely annoying, not only to strangers, but to the inhabitants themselves.

"In Plate VIII., fig. 6, a plan, or horizontal view, is given of a portion of paving for a public street, of the kind which I am suggesting. Fig. 7 is a vertical section of the same, taken crossways: *a a a a* is an oblong box made of cast-iron, with cross partitions, leaving eighteen square sockets, into each of which a wooden block, the grain upwards, is to be inserted, for the purpose of occupying the place of the ordinary paving-stones. These blocks may be of any kind of wood that will answer for that purpose; though I should prefer larch, as that is less likely to decay than most other woods, and is more tough and difficult to be split or torn asunder, and, when kept damp, as it naturally would be while in the earth, would last for ages. The dimensions of these wooden blocks might be *about eight inches square on their top surface, and about eighteen inches high*: their form, as seen in the section, fig. 7, should be *slightly tapering from a little below the middle downwards*, for the purpose of fitting solidly into the recesses of the iron box, *and also slightly tapering upwards from the same part*, as shown in the section, for the purpose of allowing gravel, or broken stones, to be introduced between the wooden blocks when fixed, in order to wedge and confine the blocks firmly, and prevent them from being shaken or displaced by carriages as they pass over.

"The iron boxes may be about four feet and a half by two feet and a half, on their superficies, and about eight inches deep, or any other dimension that circumstances may render convenient. The bed, or foundation, of the road being prepared by rolling, ramming, or otherwise, so as to be perfectly solid, and as level as *possible, as many of these boxes
 *827] are to be laid down as will cover the road, and which are to be made as secure as may be on the sides, to prevent them from being pushed from their situation. Into the recesses of the iron boxes, the blocks of wood, previously prepared, and all of one length, are to be introduced, the lengthways of the grain, in a perpendicular direction. When thus placed, their surfaces being all level, gravel, broken stones, or hard rubbish, are to be rammed in between the wooden blocks, and the road will be formed, ready for immediate use, in such a firm manner that neither time nor the heaviest weights which may pass over it, will in any degree alter its level, or destroy the materials of which it is composed."

Mr. Heard's letter states as follows:—

"October 6th, 1832.

"I take the liberty of soliciting that you will lay before the Society of Arts the following account of a mode of constructing roads in cities, hitherto totally unknown in England, and by far the most perfect that has come under my notice. No person will deny that it is desirable to have the streets of towns so paved, that in dry weather there should be no dust. and in wet weather no mud, and as little noise as possible from the passing of carriages. All these advantages are combined in the kind of road I

allude to, besides being smoother than a macadamized road, even when the latter is in its most perfect state :—

“ In countries abounding with wood, various schemes have been adopted for the formation of roads of that material ; but, hitherto, they have always been made by laying logs or planks, parallel to, or at right angles with, the sides of the way. These logs are easily displaced, and soon cut up by the horses’ hoofs ; and, when once out of order, no road can possibly be worse. The *improved road, on the contrary, will last five or six [*828 years without repair.

“ The following instructions will be found sufficient for the construction of roads on this principle :—

“ 1. Prepare a hard and level bed of gravel or broken stone covered with sand, and well rolled, about nine inches lower than the intended surface.

“ 2. Take logs of timber of sufficient diameter, and, by means of equidistant circular saws, cut them into equal lengths, of one foot each.

“ 3. These round logs must now be passed under a sexangular steel stamp, which cuts off the outside of the log, and leaves little more than the heart of the tree, in the form of a sexangular block.

“ 4. Two sides of this block must now be bored three inches deep, with an inch borer, for the reception of a wooden pin six inches long, which is to be driven into the hole already prepared in the log, the three inches of the pin which project being inserted in the next log. The operation of laying the blocks of wood and driving the pins proceeds rapidly, and the surface of the road soon assumes a beautiful chequered appearance, somewhat resembling an inlaid floor ; and the fibres of the wood standing vertically, and not horizontally, there is not a possibility of splintering. The whole is held compactly together by a narrow strip of stone pavement ; and nothing remains to be done but to cover it with a thin coat of boiling tar, and on the tar a fine layer of sand ; by which means every interstice is filled up, and moisture excluded.

“ In addition to the advantages already mentioned, of never being either dusty or muddy, this road is little inferior to a railroad in point of smoothness ; so that one horse will easily draw on it the burden of two.

“ If, at the end of five or six years, the road should be so injured as to require repairing, it may be done by *taking up the logs, sawing a [*829 new face, and replacing them ; when the road will be again equal to new.

“ The one which I saw constructed in the above-mentioned manner, was in one of the most frequented streets of a populous city ; and when I left that country, had stood between three and four years uninjured.”

“ October 13th, 1832.

“ I hasten to supply the omission in my communication on the construction of a wooden road upon new principles, by informing you that the first experiment was made in St. Petersburg, before the house of the Governor-

General, in the street called the Great Morskoi. After this piece of road had stood several years unimpaired, the plan was tried on a larger scale, in the street called the Maloi Millionne; and this trial only seemed to confirm the good opinion the public had already conceived of this mode of pavement; and, consequently, in the course of last summer, (1832,) the Nevsky Perspective, from the Admiralty to the Anitchkin Palace, was paved in a similar way—not however from one side to the other, (this street being of an extraordinary width,) but two strips, each sufficiently wide for two carriages to drive abreast, the original stone pavement being left in the intermediate spaces.

“I neglected also to state that a road constructed in this manner should not be bound together so tight by the side pavement as to prevent the possibility of a slight expansion of the wood, from the absorption of moisture. I was led to make this remark by the swelling up of a small piece of foot-pavement on a cast-iron bridge, when, the iron sides preventing the least expansion, the natural consequence of the absorption of moisture was the swelling up of the pavement; but this never occurred where the log pavement was held together by a strip of common stone pavement.

*830] “Although the above-mentioned streets in which the *experiments have been made are places of so great traffic that roads constructed upon the M^rAdam principle were found of insufficient durability, yet no excessively heavy loads comparable to the wagons and heavy carts used in England ever passed over them; I therefore would not pledge myself that such a road would bear uninjured the enormous burdens continually passing through the streets of the city.”

The following extracts from the *Mechanics' Magazine*, published respectively, in London, the 24th of September, 1825, and the 15th of March, 1834, were also read:

“It is the practice in Vienna and other cities, to pave the open courts of the hotels with blocks of hard wood, a few inches long, set on edge; over which the wheel-carriages roll almost without noise. We think a hint might be taken from this practice for paving our suspension-bridges. A stratum of road-metal, four or five inches thick, laid upon one of these bridges, will nearly double its weight, and render much additional strength and cost necessary. Were short blocks of hard wood substituted for the stone, two-thirds of the weight would be saved, and also two-thirds of the additional expense which a stone road would occasion. Were the pores or tubular cavities of the wood previously filled with a calcareous or other stony solution, or even with pitch, its hardness would be a good deal increased, and its durability still more, by the exclusion of the water. As broken wood would answer for this purpose, and as the labour of cutting and laying would be comparatively small, we do not think the expense would much exceed that of M^rAdam's road-metal. We have often wondered, indeed, that the Vienna wooden pavement is not adopted in some of

our most fashionable streets, where the noise occasioned by the constant passing of coaches must be felt as a serious nuisance."

"Mr. James Heard, of Blackheath, states in a *communication to the Society of Arts, published in the last part of their Transactions, that he had seen at St. Petersburg some excellent specimens of street-paving, formed of wooden blocks, set with the grain upwards; and he speaks of it as 'a mode of constructing roads in cities,' not only new to Russia, but 'hitherto totally unknown in England.' Mr. Heard has been misinformed. As far back as 1825, this mode of paving was recommended to the British public by Mr. John Finlayson, as 'particularly suited to the streets of London and other great towns;' and one of the proofs he gave of its durability was, that, in the case of a causeway in Scotland, which had for experiment been partly constructed of wooden blocks and partly of granite, the wooden portion was found, after a lapse of twenty-four years, to be much less worn than the granite. May we not, therefore, fairly conclude that the Russians have only availed themselves of Mr. Finlayson's suggestion?" [*831]

The steward of Sir William Worsley stated that, in 1834, some wood-paving was laid down in the vestibule of Hovingham Hall, Yorkshire, consisting of hexagonal blocks, tapering towards the bottom, (one of which was produced;) that this vestibule was a covered way leading from the riding-house into the pleasure-grounds, about thirty-five feet in length and ten feet in width; that every carriage going to the mansion must pass over this pavement; that many persons went to see it whilst laying down and since; and that the blocks were laid upon a surface of sand, and driven in with a rammer, after the manner of stone-paving.

Several other witnesses, professing acquaintance with the subject, concurred in saying that there was no substantial difference in principle between the description of the block in the plaintiff's specification and that produced from Sir William Worsley's pavement; and that the practicability of paving streets with wood had been *well known to scientific men ever since the publication of Finlayson's and Heard's letters. [*832]

The learned judge, after directing the jury to find for the plaintiff upon the first issue, said, with reference to the second issue, that if the subject-matter of the patent was the result of information communicated to the plaintiff from a foreign country, he would, in contemplation of law, be entitled to a patent, as being the first and true inventor; but that it was otherwise if he derived his information either from books published in this country or from oral communications from any person here; that, if the plaintiff had acquired, from scientific works published in this country, the knowledge that enabled him to take out the patent, the patent would be void; for that it was not competent to any individual so to avail himself of that knowledge and information which had already been given to the public. After observing that the defendants had not brought home to the plaintiff the fact of his having seen the letter of Finlayson or that of Heard, he told

them that it was for them to judge, upon the whole of the evidence, *whether or not the plaintiff had seen those publications, and so had derived his alleged invention from the common stock of knowledge already possessed by the public of this country*, or whether, as suggested in the patent, he had derived it from some person resident abroad, a source of information which the law regarded as equivalent to invention. The learned judge said that he was unable to discover the slightest difference between the mode of paving described by Mr. Heard, and the mode pointed out in the specification; and that the question for the jury to decide was, whether the plaintiff *derived the knowledge* which enabled him to take out the patent from that which was part of the common stock of knowledge of this country. Upon the third issue, he stated to the jury, as matter of law, that the method of paving
 *833] *with wood* was a "new manufacture," and therefore the proper subject of a patent. Upon the fourth and fifth issues, he said there could be no doubt as to the utility of the invention, or as to the sufficiency of the specification. Upon the sixth issue, he told them, that if the blocks used at Sir W. Worsley's were essentially the same as those described in the plaintiff's specification, there was such a public user as would make an end of the patent. As to the last issue, the learned judge expressed an opinion in favour of the sufficiency of the title of the specification; but he reserved the point.

The jury returned a verdict for the plaintiff on all the issues upon the first count.

Channell, Serjt., in Michaelmas term last, obtained a rule nisi for a new trial, on the ground of misdirection, and that the verdict was against evidence. He submitted that it was not incumbent on the defendants to show that the publications which described the mode of paving claimed by the plaintiff, had come to his knowledge before the date of the patent; that the mere fact of prior publication was conclusive against the validity of the patent, in like manner as a prior patent would invalidate a subsequent patent for the same subject-matter, though the patentee might have no knowledge of the existence of the prior patent. He cited *Lewis v. Marling*, 10 B. & C. 22, 5 Mann. & R. 66, 4 C. & P. 52, 57, 1 Webster, 490, 493; *Morgan v. Seaward*, 2 M. & W. 544, 1 Webster, 170, 187; *Carpenter v. Smith*, 9 M. & W. 300, 1 Webster, 530, 540; *Jones v. Berger*, ante, Vol. V. 208, 6 Scott, N. R. 208, 1 Webster, 544.

Sir *T. Wilde*, Serjeant, (with whom were *Shee*, Serjt., and *Webster*,) in Easter term last (May 2) showed cause. The supposed misdirection refers to
 *834] the issue whether the *plaintiff* is the true inventor; upon which it was left to the jury to consider whether the plaintiff had seen the letters in question, or derived information from them. This direction was substantially such as has repeatedly been given and has never been successfully objected to. The plaintiff was the first person who brought the invention into public notice. The letters of Finlayson and of Heard amount to mere speculations upon the subject: it is quite clear upon the evidence, that the

plaintiff alone was the party to whom the public of this country are indebted for this invention. Finlayson's letter may be left out of consideration. Those of Heard produced no practical results. The mode of paving with blocks suggested therein, differs, in two essential particulars, from the invention described in the plaintiff's specification. The mode suggested by Heard was, driving the ends of the blocks into the sand to the depth of three inches, a process wholly destructive of that which was of the very essence of the plaintiff's method, his main object being, to place the blocks so close as that there shall be an equal pressure on all sides from the lower to the upper surface. If, as Heard directs, the wooden pavement be held together by a non-elastic substance, the absorption of moisture would cause the wood to swell, and would thereby force it from its proper position. The defendant relies upon the issues taken upon the second and sixth pleas. In *Lewis v. Marling*, 1 Webster, 490, 4 C. & P. 52, which was an action for the infringement of a patent for improvements in shearing-machines for shearing or cropping woollen or other cloths, &c., Lord TENTERDEN said: "It is incumbent on the plaintiffs to show that their machine is new; but it is not necessary that they should have invented it from their own heads; it is sufficient that it should be new, as to the general use, and public *exercise, in this kingdom." In *Cornish v. Keene*, 1 Webster, 501, [*835 the direction of TINDAL, C. J., is substantially the same. The issue on the second plea goes to the personal merit of the inventor. Upon the simple issue the defendant must contend that the judge was bound to give a compound direction. Here, the plaintiff's information is not derived from any English source, but is either his own invention or is a communication from a foreigner. There is an entire absence of any thing that may be called similarity. The evidence as to Finlayson's communication is too absurd to require observation. It contains that which would render the whole useless. What is to become of the block if the three inches of sand are displaced? There was no evidence that any attempt had been made to carry this plan into execution. [TINDAL, C. J. Your patent is taken out, generally, for making or paving public streets and highways, &c., with timber, or wooden blocks.] The objection appears to be that the general principle was known before. But the proposed narrow strip of stone pavement would, as in Heard's case, be destructive of the whole. The wooden pavement would swell and force up the stone pavement. Sir W. Worsley's pavement, though it might be used for a vestibule leading to a single house, would be wholly inapplicable to a place of great traffic, as Cheapside. Instead of being capable of bearing heavy weights, it would be liable to be disturbed by the slightest pressure. In a street in London it would not last forty-eight hours. It is said that the verdict is wrong, because the jury did not find, as a fact, that the plaintiff had derived his information from the publications which were given in evidence, as in Heard's plan. The production of a newspaper containing a notice of the dissolution of a partnership would not be *evidence to charge a party with notice of that [*836

dissolution, unless it was proved that he was in the habit of reading that newspaper. The alleged publication was limited to a particular class of which the plaintiff did not form one. The points of dissimilarity between the plaintiff's invention and the plans which had been previously suggested, go further towards showing that he is not indebted to those suggestions than the existence of those suggestions tends to show that he availed himself of them.

There is no ground for the objection to the title. The title of a patent is to be read in connection with the specification. [TINDAL, C. J. In *Cooke v. Pearce*, 13 Law Journ. 189, Q. B., it was held by the judges in the Exchequer Chamber that mere generality in the title will not vitiate a patent which really includes the invention, provided there be no fraud.] There is no misdirection, and the verdict is right.

Shee, Serjt., on the same side. Heard is stated by the defendants to have derived his information from abroad; the plaintiff may have done the same. That equal lateral pressure which is so important a feature in the plaintiff's patent, is not to be found in these previous suggestions. The defendants contend that the mere fact of publication is sufficient to vitiate the plaintiff's patent, whether he knew of such publication or did not. No case was however cited on moving for this rule to countenance such a position.

The term "first inventor" does not import that the party so designated is the first discoverer of the invention in the whole world. It is material to consider what the object of the legislature was, in limiting the privilege to the first inventor. The case of *Cornish v. Keene*, 1 Webster, 501, points out the meaning of the legislature: one object being, to reward the ingenuity of the inventor. The plaintiff derived no assistance from those who *837] are supposed to have preceded him. The question as to previous use of the invention was distinctly left to the jury. The learned judge ruled precisely as Lord ABINGER had done in *Carpenter v. Smith*, 9 M. & W. 300. In *Lewis v. Marling*, 10 B. & C. 22, 5 Mann. & R. 66, BAYLEY, J., says: (a) "If the model brought from America had been seen by the plaintiff, he could not afterwards have claimed to be the inventor. But if I discover a certain thing for myself, it is no objection to my claim to a patent, that another also has made the discovery, provided I first introduced it into public use." In *Carpenter v. Smith*, Lord ABINGER was of opinion, that a man might be the first and true inventor of that which had been invented before; *Walton v. Potter*, 1 Webster, 580. If Heard's letter disclosed a useful contrivance, it is extraordinary that none of the forty-nine patents now in existence should have been taken out until the plaintiff's patent had been obtained. Heard was not competent to explain the mode of carrying into effect that which he had communicated as a matter of curiosity. Sand is used under the plaintiff's process, but not for the purpose alluded to by Heard. On the face of it, Heard's system is impracticable.

(a) 10 B. & C. 27.

Channell, Serjt., (with whom were *Byles*, Serjt., *Hoggins* and *Warren*,) in support of the rule. The allegation in the declaration is, that the plaintiff is the first inventor within the realm. The specification is more full. A party who obtains his information from a foreigner may be considered as the first inventor for the purpose of a patent. But no proof was given that the plaintiff had so obtained information. Two pleas raise this question: and it lies upon the plaintiff to show that he was the first inventor. There was no proof of any communication *from abroad as is generally given in such cases. The defendants object to that part of the [*838 learned judge's address to the jury, in which he told them that, although it was shown that the books had been extensively circulated, they were not brought home to the plaintiff. The ground on which the jury returned their verdict was, that the knowledge of these books had not been brought home to the plaintiff. But it is submitted that, if the description contained in *Heard's* letters substantially corresponded with the plaintiff's specification, his patent is void, whether knowledge of the publication was brought home to the plaintiff or not. There are three descriptions of publication that will avoid a patent—first, the production and public user of a similar article; secondly, a publication, by means of a specification, of a prior patent for an invention producing the same result; thirdly, a publication in books of science having an extensive circulation in this country. Previous unsuccessful attempts (as in *Lewis v. Marling*, and other cases cited) will not invalidate the grant: there must be a dedication to the public.

May 6. Channell, in continuation. The communication need not be to the patentee. *Tennant's* case, *Davies*, 431; *Dollond's* case, cited 2 H. Bl. 487.(a) [*CRESWELL*, J. There, the patent related to an article manufactured.] The party may not be bound to attend to mere reasoning which does not possess the marks of authority; though it may be doubted whether, even in such case, the party is not bound to make some inquiry. However recent a publication may be, and however limited its circulation, still it is a question for the jury, whether the information contained therein is not fairly brought within the reach of the party. *TINDAL*, C. J. So, if it is to be found in *very old* books.] In *Morgan v. *Seaward*, 1 Webster, 190, *ALDERSON*, B., says: "It is certainly a [*839 most important question what are the limits of what a man may do without its being a publication, and a question on which much remains to be discovered: the law is in a very confused state. In the case of *Lewis v. Marling*, I should certainly have entertained very considerable doubts. If the question is to be put altogether on the ground of the public use of the invention, how did Dr. Brewster lose the benefit of his invention of the kaleidoscope, because it had been previously published in a book, if it had not been used, though made known to all the world before? If Dr. Hall had published his discoveries in a book, I apprehend that would have put an end to *Dollond's* patent. Much obscurity

(a) And see Mr. Webster's remarks upon that case, 1 Webst. 44, 53.

has been introduced into this question by the use of loose expressions and *dicta*." In *Carpenter v. Smith*, 9 M. & W. 300, 302, 1 Webster, 541, ALDERSON, B., says: "How then, do you get over the case of the invention for which a patent was avoided,(a) (Dr. Brewster's kaleidoscope,) because it had been previously published in a book? the principle being that it could be appropriated by anybody, because it had already been given to everybody." In *The Househill Company v. Neilson*, 1 Webster, 718, n., Lord LYNTHURST, C., observed: "If a machine is published in a book, distinctly and clearly described, corresponding with the description in the specification of the patent, though it has never been actually worked, is not *840] that an answer to the patent? It is continually the practice on *trials for patents, to read out of printed works, without reference to any thing that has been done." In the case of *Soames's Patent*, 1 Webster, 733, Lord CAMPBELL says: "I should say, sitting here,(b) if it had been published in a foreign journal, considering whether the patent should be *prolonged*, I should be influenced by what I saw published in a foreign journal, without inquiring whether it was known in England; though, when sitting in a court of justice, and considering the *validity* of the patent, I should require that it should be known in England." A very limited publication may not avoid a subsequent patent; but a patentee is not to presume upon his own exclusive ignorance. Here, the jury have misunderstood the effect of the evidence. The blocks used at Sir W. Worsley's, and the blocks described in Heard's letters, were precisely the same as those described in the plaintiff's specification. Public user is something more than a mere experiment or series of experiments; it means, however, not a user *by* the public, but a user *in* public, where all persons, going to the spot, may see the thing. From the title of this specification it would naturally be inferred that the patentee claimed an exclusive right to the use of blocks of wood for paving, in lieu of blocks of stone. [TINDAL, C. J. In *Neilson v. Harford*, 8 M. & W. 806, 1 Webster, 331,(c) it was held that an ambiguous title will not vitiate a patent, if the ambiguity is explained by the specification.] *Cur. adv. vult.*

TINDAL, C. J., now delivered the judgment of the court.

This was an action for the infringement of a patent for an invention for "making or paving public streets and highways, and public and private *841] roads, courts, and *bridges, with timber, or wooden, blocks." The defendants pleaded "that the plaintiff was not the first and true inventor of the invention in the letters-patent and specification mentioned," besides various other pleas, which it is not necessary to particularize.

(a) The case of Dr. Brewster's kaleidoscope was referred to by Alderson, B., during the argument in *Morgan v. Seaward* in the Exchequer, H. T. 1837, (2 M. & W. 544, 1 Webster, 190,) and again in *Carpenter v. Smith*, (cited above;) but, in fact, no legal proceedings ever took place with reference to the patent obtained by Dr. Brewster for the kaleidoscope, (which patent has long since expired by effluxion of time,) and the fact of such prior publication in a book, as suggested, is denied by Dr. Brewster. *Ex relatione Webster.*

(b) In the Privy Council.

(c) Cited *anté*, 1 ol. IV. p. 196, V. p. 208, VI. p. 740.

Upon the trial, at the last summer assizes at Liverpool, before my brother CRESSWELL, a verdict was found for the plaintiff; but a rule nisi was afterwards granted for a new trial. On the report of the learned judge, it appears, that, before the granting of the letters-patent, there had been published, in a scientific work, in England, a letter from a gentleman named Heard, containing such a description of a mode of paving with blocks, as made it fit to be submitted to the consideration of the jury, as not differing substantially from the invention for which the patent was granted. In summing up the evidence with reference to this plea, the jury were told, in substance, that, if they thought the patentee had *borrowed* his invention directly from the publication which had been proved, he could not be considered as the first inventor; also, that, if the matter had been so far communicated to the public as to have become a part of the public stock of information, *and he had thus obtained his knowledge indirectly from the publication*, he could not be considered as the first inventor within the meaning of the statute.

On the discussion before us, it was contended that this mode of summing up, although undoubtedly correct as far as it went, yet did not present the entire case to the consideration of the jury, for, it was urged, that, if the invention had been communicated to the English public, although it had never, directly or indirectly, come to the knowledge of the patentee, still he could not be considered as the inventor. It was admitted, on the part of the defendants, that no case could be cited in which the point had been expressly decided; but it was contended, that, on reason and principle, such must *be held to be the law; for that, if the invention had already been communicated to the public, it would be unreasonable [*842 that they should lose the benefit of it and be restricted from making use of it, by a patent taken out by one whose claim to such patent could only be supported on the ground of his being ignorant of that which had already been communicated to the rest of the world. And, though no decided case was cited, various dicta of learned judges were referred to in support of the view so contended for by the defendants; particularly what was said by ALDERSON, B., in *Carpenter v. Smith*, and the observations made by Lord LYNTHURST and other lords of the Privy Council, as reported in 1 Webst. Pat. Cases, 718, 719. Lord LYNTHURST says: "If a machine is published in a book, distinctly and clearly described, corresponding with the description in the specification of the patent, though it has never been worked, is not that an answer to the patent? It is continually the practice on trials for patents, to read out of printed books, without reference to any thing that has been done." And, again: "If the invention is in use at the time the patent is granted, the man cannot have a patent, although he is the original inventor: if it is not in use, he cannot obtain a patent if he is not the original inventor. He is not called the inventor who has in his closet invented it, but who does not communicate it: the first person who discloses that invention to the public is considered as the inventor."

On a full consideration of the subject, we have come to the conclusion that the view taken by the defendants' counsel is substantially correct; for, we think, if the invention has already been made public in England by a description contained in a work, whether written or printed, which has been publicly circulated, the patentee is not the first and true inventor within the meaning of the statute, whether he has himself borrowed his invention from *843] such publication or not; because we think the *public cannot be precluded from the right of using such information as they were already possessed of, at the time of the patent granted.

The application of this principle must depend upon the particular circumstances which are brought to bear on each particular case. The existence of a single copy of a work, though printed, brought from a depository where it has long been kept in a state of obscurity, would afford a very different inference from the production of an Encyclopædia or other work in general circulation. The question will be whether, upon the whole evidence, there had been such a publication as to make the description a part of the public stock of information.

We think, therefore, that, as this question has not been submitted to the jury, there ought to be a new trial.

Rule absolute.(a)

(a) Vide *Bentley v. Keighley*, antè, p. 652, 8 Scott N. R. 372.

HOLCROFT v. MANBY. June 29.

A cause and all matters in difference between A. and B. were referred, C. consenting to be made a party to the reference. The arbitrator directed a verdict to be entered for B., but directed that C. should pay to A. 52l. 10s., and the costs of the reference and award. A. having become bankrupt, C. declined to pay without authority from A.'s assignee. Held, that A.'s attorney, who had a lien upon the award for his costs, was not entitled to an order upon C. under the 1. & 2 Vict. c. 110, s. 18.

By an order of nisi prius made in a cause wherein Thomas Holcroft was plaintiff and Charles Manby defendant, a verdict was entered for the plaintiff, damages, 200l., costs, 40s., subject to the award of a barrister,—to whom the cause, and all matters in difference between the parties, and between *844] the plaintiff and the *Institution of Civil Engineers, (who, by their attorney, D. R., consented to become parties to the order, and to be bound thereby,) were thereby referred, and who was to say what was fit to be done between the parties, and to give any directions he should think proper, as to any sum of money that he might find to be due from the defendant: the costs of the suit to abide the event, and the costs of the reference and award to be in the discretion of the arbitrator.

The arbitrator awarded that a verdict entered for the defendant: and, after reciting that it was agreed by the counsel and attorneys for the plaintiff and the Institution of Civil Engineers that all matters in difference between the plaintiff and the Institution consisted of a claim by the plaintiff against the Institution (of which the defendant was the secretary) for

certain work and labour done by him for the Institution, the arbitrator found the Institution to be indebted to the plaintiff in 52*l.* 10*s.*, in respect of the matters in difference between them; and he directed that the Institution should on a certain day pay that sum to the plaintiff; that the Institution should pay to plaintiff all his costs of the reference, and should pay the costs of the award.

On the 9th of December last, the plaintiff's costs of the reference and award, as against the Institution, were taxed at 51*l.* 17*s.* On the 18th, a demand was made of the sum awarded and costs by Mr. Robson, the plaintiff's attorney. Robson, on the same day, gave notice to the Institution that he had a lien upon the debt and costs so payable by them. .

On the 27th of June, 1843, the plaintiff filed his petition in the court of bankruptcy under the 5 & 6 Vict. c. 116, and Mr. Groom was appointed official assignee of his estate; whereupon the Institution declined to pay the sum awarded and costs, to Robson, without the assent of Groom.

*Holcroft, in his schedule filed in the court of Bankruptcy, admitted a debt to Robson of 200*l.*, or thereabouts, for professional business and money lent. [*845

Sir T. Wilde, Serjt., in Hilary term last, obtained a rule calling upon the Institution of Civil Engineers to show cause why they should not pay to Robson the sum awarded to be paid by them to the plaintiff, and also the taxed costs of the reference and award, and the costs of the application. As directed by the rule, notice of the rule was given to Groom, the official assignee.

Channell, Serjt., in Easter term last, showed cause. This action was brought by Holcroft to recover 10*l.* due to him from Manby, who defended it on the ground that the credit was given not to him but to the Institution. The question is, not whether the Institution was bound to pay the 52*l.* 10*s.* and the costs of the reference, but whether they can refuse making that payment to the plaintiff. Formerly, the remedy of a party for the recovery of a sum of money to be paid to him under an award, was by action or by attachment; but now under 1 & 2 Vict. c. 110, ss. 18 and 19, the court is authorized to grant a rule for the payment, upon which rule, when made absolute, execution may issue. *Doe v. Amey*, 8 M. & W. 565. (a) But such a rule cannot be granted on the application of a third party. The lien of the attorney is not disputed. There is nothing to prevent the assignee from obtaining a rule for an attachment for non-performance of the award. A rule for an attachment in respect of the non-payment of this sum could be obtained only by the plaintiff or by his assignee. But if, for the purpose of an attachment, it is necessary to proceed in the name of the party or of his assignee, there is no reason why the rule should be different in a case under the 1 & 2 Vict. c. 100. In such a case, no power is given to bar parties under the interpleader act, 1 & 2 W. 4, c. 58. s. 3. (b) [*846

(a) And see *antè*, Vol. VI. 149.

(b) And see *Holmes v. Mentze*, 5 N. & M. 563

The payment to Robson would be no protection to the Institution against any proceedings on the part of the assignee, to compel payment to him. The attorney has a lien upon the award. *Jones v. Turnbull*, 2 M. & W. 601, 5 Dowl. P. C. 591, Murph. & H. 100. But he cannot enforce it by taking proceedings in his own name.

Sir T. Wilde, Serjt., in support of his rule. There is no pretence for resisting the application. A plaintiff's attorney has a lien for his costs upon the fund recovered, whether under a judgment or under an award, as also upon the papers in the cause; and it is competent to him, by virtue of his ~~lien~~, to issue execution in the name of his client. In this case the assignee is not interested. Although he represents the estate as well as the creditors, he only takes that in which the bankrupt has a beneficial interest, as well as a legal title,—that only which is divisible amongst the creditors; *Scott v. Surman*, Willes, 400. The court will interfere with a lien only where, under the same circumstances, they would interfere with a set-off. If the defendant had given a cognovit, the attorney might have signed judgment for the purpose of enforcing his lien. If an order was made for the payment of money to the client, the attorney might come to the court and claim his lien. [TINDAL, C. J. Suppose a rule to be granted directing the money to be paid to Heard or his attorney, then if the attorney got the order, he might receive the money. I do not see what objection there would be to his doing so.] If the difficulties alleged by the Institution *847] *be *bonâ fide*, why do they not come in under the interpleader act?

[TINDAL, C. J. There was no action pending. What protection would the judgment-debtor have, if your rule were made absolute?] They can safely make the payment to the plaintiff's attorney, upon his satisfying the court that he has a lien. *Winch v. Keeley*, 1 T. R. 619. [CRESSWELL, J. I am not satisfied that the Institution would be safe in paying the 52*l.* 10*s.* 0*d.* to Robson. Do you know any instance of an order being made for the payment of a sum of money in discharge of a lien?] Where to a plea of bankruptcy the plaintiff replies an equitable assignment, the court recognises and gives effect to a lien. Execution has been permitted to issue after a collusive payment, made for the purpose of defeating the lien of the attorney in the cause. (a) Here, part of the demand in respect of which the lien is claimed, is for the costs of the action. The authority of the attorney to receive the amount of the lien must be a protection to the debtor who pays it. Where one man has authority to receive, the other party must be justified in paying. Here, the authority is not only not revoked, but is not revokable. (b) Robson comes here as an officer of the court, praying that the court will enforce a privilege given to him by law. Suppose the client went to America, a mere order to pay to the client or his attorney would entitle the attorney to issue an attachment in his client's name, if the money was not paid upon a demand made by the attorney.

(a) Vide tamen *Clarke v. Smith*, antè, Vol. VI. p. 1051.

(b) Vide *Story on Agency*, § 488, 489; *Story on Bailments*, § 209

The statute of 1 & 2 Vict. c. 110, directs that the order shall have the effect of a judgment. The party entitled to receive the money may apply to the court for an order for payment. The application is correct both in form and in substance. There is no other mode of *satisfying the statute. All Robson can do is to deliver his bill, swear that it is due, and call upon the plaintiff or upon the party charged with the payment, to pay him the amount. One party does not dispute the right of the applicant, and the other does not appear upon the rule. What can the applicant do, except appear before the court, pledging his oath and challenging every party to meet him? The claim is admitted by the only parties who are interested in opposing it. If this application cannot succeed, a party may defeat his attorney's lien by simply coming before the court, and saying nothing. Assuming that the lien is made out, the applicant has proceeded in the mode prescribed by the rules of the court. The consequences of the order are foreign to the present inquiry. [*848]

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court. In this case, a reference of the cause had been made to a barrister, to which reference the Institution of Civil Engineers had become parties. An award was made on the 16th of June, 1843, in the action, in favour of the defendant; but a sum of 52*l.* 10*s.* was awarded to be paid by the Institution of Civil Engineers to the plaintiff, together with the costs of the reference and award, amounting to the additional sum of 51*l.* 17*s.*

On the 27th of June, 1843, Holcroft filed a petition in the court of bankruptcy, and Groom was appointed the official assignee. It appears also from the affidavits, that Holcroft's attorney (Mr. Robson) claims to have a lien on the award and the sums awarded, for his bill, amounting, as he makes it out, to 200*l.* Under these circumstances, Robson has obtained a rule by which the Institution of Civil Engineers are called upon to show cause why they should not pay him the sum awarded and the costs of the reference and award, and of the *application; and notice of the rule was directed to be given to Groom, the official assignee of the plaintiff. [*849]

The Institution of Civil Engineers have always professed to be willing to pay the money on obtaining a receipt or other sufficient authority from the assignees of Holcroft, sanctioning the payment. Application has been made to Groom to give such an authority; but to this application he appears to have replied with studied caution, and certainly without saying any thing which can be considered as a direct sanction to the payment being made to Robson. No case was cited on the argument before us to show that an attorney can enforce, in this way, the payment of a lien. But, independently of that consideration, it is to be borne in mind that a rule of court has now the effect of a judgment; and, before such an order can be made, the court must be perfectly satisfied that the claim is free from all doubt.

Robson is not without remedy in this case. If his claim be well founded, and such as the law entitles him to enforce, he may bring an action, in his client's name, on the award, the judgment of the court in which action will be subject to revision by a superior court; but, if the present rule is made absolute, the decision is final. We feel ourselves bound, therefore, to abstain from deciding in this summary way a question in which any legal doubt is involved.

For these reasons, we think the present rule must be discharged.

Rule discharged.

END OF TRINITY VACATION.

*850] *IN THE HOUSE OF LORDS.

BOURNE and Others v. GATLIFFE, in error. June 10

To a count in assumpsit by A. against B. upon a contract by B., safely to carry in a steam-vessel certain goods of A. from Dublin to London, and to deliver the same at London to A. or to his assigns, upon payment of freight,—assigning a breach in non-delivery of the goods in London.—B. pleaded that the goods were put on board under a bill of lading, by which they were made deliverable to A. or his assigns on payment of freight; that after the arrival of the vessel and goods at London, B. caused the goods to be unshipped, and safely and securely landed and deposited upon a certain wharf at London, there to remain until they could be delivered according to the bill of lading, the said wharf being a place at which goods conveyed in steam-vessels from Dublin to London were accustomed to be landed and deposited for the use of consignees, and being a place fit for such purpose; and that the goods, whilst they remained upon the said wharf, and before a reasonable time for the delivery thereof had elapsed, were accidentally destroyed by fire.

It was also pleaded, to the same count, that after the arrival of the vessel and goods at London, B. was ready and willing to deliver the goods to A. or his assigns, but that neither A. nor his assigns was or were there ready to receive the same; whereupon B. caused the goods to be landed on the said wharf, there to remain until A. or his assigns should come and receive the same, or until the same could be conveyed and delivered to A. or his assigns, with the like averment as to the said wharf being a usual and fit place; and that the goods, whilst they remained upon the said wharf, and before A. or his assigns came or sent for the same, and before B. had been requested to deliver the same to A. or his assigns, or a reasonable time for conveying them from the said wharf to A. or his assigns had elapsed, and before the same could be removed therefrom, were accidentally destroyed by fire.

Held, in the Exchequer Chamber, in affirmance of the judgment in the Common Pleas upon demurrer, that both pleas were bad in substance, as they neither showed a delivery of the goods to A. or his assigns, nor alleged that a delivery at the wharf was a delivery, according to the usage of London, with respect to goods on such a voyage, or that A. or his assigns had notice of the arrival of the goods, or that a reasonable time for A. or his assigns to receive them had elapsed when the goods were landed, or when they were destroyed, or that A. or his assigns had notice that B. was ready and willing to deliver the goods; and that, if, as the goods were deliverable to A. or his assigns, B. was not bound to deliver them until he had notice that A. or some assignee would receive, or until the party entitled should come to receive them still B. was bound to keep the goods on board (or on the wharf at B.'s own risk) for a reasonable time, to enable the consignee to fetch them, and B. continued liable until such reasonable time had elapsed.

B. also pleaded that he did deliver the goods at London according to his promise. Upon the trial of this issue, evidence was admitted on the part of A. of former dealings between himself and B. as to the carriage of goods from B.'s wharf to A.'s place of business. *Held*, in the

Exchequer Chamber, upon a bill of exceptions, that such evidence was admissible for the purpose of showing the course and usage of delivery at the port of London; though, for the purpose of adding to, or otherwise varying, the terms of the written contract, it would have been inadmissible.

Held, also, in the Exchequer Chamber, upon a bill of exceptions, that the judge was warranted in declining to tell the jury that a delivery at the wharf was, in point of law, a sufficient delivery, that B. was thereby discharged from all further responsibility, and that no contract could be inferred from the course of dealing, to vary or superadd to the written contract contained in the bill of lading; and in stating that it was a question for the consideration of the jury, whether there had been a delivery of the goods, and that it was for them to say whether, upon the evidence, a delivery at the wharf was a delivery according to the usage and practice of delivering goods observed in the port of London.

In another count, on a promise that, in consideration of the previous delivery of goods to be so carried to London for freight, and of the employment of B. by A. for other reward, to take care of the goods at the wharf, where they should be landed, and to carry and convey the same from such wharf to A.'s place of business, and there to deliver them to A. in a reasonable time after landing,—a breach was assigned in the non-delivery of the goods, although a reasonable time for that purpose had elapsed. B. pleaded that after the arrival of the steam-vessel in London with goods on board, and after the goods had been safely landed on the wharf, B. caused the same to be safely deposited and stored upon the wharf, until they could be carried and conveyed therefrom, and delivered to A., the said wharf being a usual fit and proper place for that purpose, and that B. took care of the goods whilst they remained upon the wharf until they were destroyed by an accidental fire before they could be conveyed from the wharf, and before a reasonable time for their being so conveyed, or for the delivery thereof to A. had elapsed; by means whereof, and from no other cause, and without any carelessness, negligence, or improper conduct, or want of due care in B., he was prevented from delivering the goods to A.

Held, in the Exchequer Chamber,—in reversal of the judgment in Common Pleas upon a demurrer to this plea,—that the plea was a good answer to the count, inasmuch as the contract to carry from the wharf for other reward was not of the same nature as the contract to carry to it, and the count contained no averment that B. was a common carrier; and that if B. was not subject to the liability of a common carrier whilst the goods were in the warehouse, all that he was bound to do by the contract was, to take reasonable care of the goods whilst in the warehouse.

In the Common Pleas the sum of 734*l.* was awarded to the plaintiff below for his costs, and in the Exchequer Chamber that part of the judgment of the Common Pleas was affirmed, and the sum of 311*l.* was adjudged to the defendant in error for costs of the delay of execution on pretence of prosecuting the writ of error.

The House of Lords affirmed the judgment of the Exchequer Chamber as to the affirmance and the reversal of the judgment in the Common Pleas, except that the judgment of the Common Pleas and of the Exchequer Chamber was reversed as to part of the 734*l.* awarded to the defendant in error for costs, by deducting therefrom the costs which had been allowed in the Common Pleas to the plaintiff below in respect of the demurrer, the judgment upon which in his favour was reversed in the Exchequer Chamber, and also as to 311*l.* for costs awarded in the Exchequer Chamber, the partial reversal of judgment in that court showing that the writ of error was not improperly brought. No costs were allowed in the House of Lords.

THE judgment pronounced in the court of Exchequer Chamber upon the writ of error brought in this action, (a) was entered up as follows:—

*“Whereupon, all and singular the premises having been considered, and as well the record and proceedings aforesaid, and the judgment given in form aforesaid, as the matters aforesaid by the said R. Bourne, &c., above for error assigned, having been, by the said court of Exchequer Chamber here diligently examined and fully understood, it appears to the said court of Exchequer Chamber that there is no error in the record of proceedings aforesaid, or in giving the judgment aforesaid as to the first count of the said declaration. Therefore

(a) Vide *antè*, Vol. III. 643, 3 Scott, N. R. 1.

it is considered by the said court of Exchequer Chamber here, that the judgment aforesaid, in form aforesaid given, as to the said first count, that is to say, the judgment in form aforesaid given that the said S. Gatcliffe should recover against the said R. Bourne, &c., his said damages, costs, and charges, amounting in the whole to 1516*l.*, be in all things affirmed, and stand in its full force and effect, the said matters above for error assigned in any way notwithstanding. *And it is further considered by the same court, that the said S. Gatcliffe recover against the said R. Bourne, &c., 311*l.*, by the same court adjudged to the said S. Gatcliffe, and with his assent, according to the form of the statute in that case made and provided, for his damages, costs, and charges, which he hath sustained and expended by reason of the delay in the *execution of the judgment aforesaid as to the*

*853] *said first count, on pretence of the prosecution of the said writ of error.* But because it further appears to the said court that the plea by the said R. Bourne, &c., lastly above pleaded, is sufficient in law, therefore, it is considered by the same court that the said last plea is sufficient in law to bar the said S. Gatcliffe from maintaining his said action against the said R. Bourne, &c., as far as relates to the said second count, and that the said R. Bourne, &c. go thereof without day, &c."

Upon this judgment R. Bourne, &c., the defendants below, the plaintiffs in error in the Exchequer Chamber, having brought a writ of error in parliament, assigned the following errors,—

"That the judgment aforesaid in form aforesaid, as to the said first count of the said declaration, that is to say, the judgment aforesaid, that the said S. Gatcliffe should recover against the said R. Bourne his said damages, costs, and charges, amounting in the whole to the sum in that behalf mentioned and adjudged, to wit, 1516*l.*, was affirmed by the court of Exchequer Chamber of our lady the queen; whereas, by the law of the land it ought to have been reversed; therefore, in that there is manifest error. There is also error in this, to wit, that it was considered and adjudged in and by the same court that the said S. Gatcliffe should recover against the said R. Bourne, the said sum, to wit, &c., by the same court so adjudged to the said S. Gatcliffe, and with his assent, for his damages, costs, and charges which he had sustained by reason of the delay in the execution of the judgment aforesaid of the said court of our lady the queen, before her justices of the Bench at Westminster, on pretence of the prosecution of the said writ of error in that behalf mentioned; therefore in that there is manifest error. There is also error in this, to wit, that the said

*854] Chief Justice disregarded the matters in the *said bill of exceptions stated by way of exception, and admitted the evidence so excepted to as therein mentioned, and directed the jury as therein mentioned, and suffered and permitted the jury to give the verdict in form aforesaid given; therefore in that there is manifest error. And the said R. Bourne prays that the said judgment of the court of our lady the queen, before her justices of the Bench at Westminster, and the said affirmance thereof, as

to the said first count, for the errors aforesaid, and for other errors in the said record and proceedings being, may be reversed, annulled, and altogether holden for nought, and that they may be restored to all things which they have lost by reason of the said judgment and affirmance thereof, &c."

The case in support of the above assignment of errors stated that the judgment of the Common Pleas was erroneous, and that the judgment of the Exchequer Chamber, so far as it affirmed any part of the same, was erroneous; and that the judgment of the Exchequer Chamber was erroneous, in that it awarded *costs and damages for delay to the plaintiff below*, and also in that it did not award to the defendants below the costs of the demurrer to the sixth plea, but, on the contrary, left them subject to those costs.

The reasons subjoined to the case were the following:—

"First. Because the third plea contains a good and sufficient defence to the first count, inasmuch as it shows that the goods were put on board under an assignable bill of lading, the terms of which, in the absence of any averment of custom controlling their signification, the courts are bound to construe according to the general law of the realm; by which the ship-owners had a right to land the goods on a wharf, as stated in that plea, and when they had so done, were not liable as carriers for subsequent loss by accidental fire.

"Secondly.—Because the fourth plea contains a good defence to the first count of the declaration, for that, the consignee not being ready to receive his goods when the vessel arrived, the ship-owners had a right to land them, upon a usual and convenient wharf, and, when they had so done, were not liable as carriers for subsequent loss by accidental fire. [*855

"Thirdly.—Because the first count does not show that the plaintiffs in error were common carriers, and therefore the third and fourth pleas are sufficient answers to that count.

"Fourthly.—That the documentary and parol evidence excepted to was improperly admitted; that its effect was, to control the written contract, and that it was not admissible, or, at all events, ought not to have been left to the jury, as evidence of a custom or usage, since it related altogether to dealings between the plaintiff and defendants, and there was no other evidence of custom or usage, with which it could be coupled. The plaintiffs in error contend, that a course of dealing between two individuals can never qualify their express written contract, and that it furnishes, by itself, no evidence,—at least as between them,—of a custom or usage capable of qualifying such written contract.

"Fifthly.—That there was no evidence to support the verdict, and that the Chief Justice left to the jury an issue upon which there was no evidence on the side of the plaintiff below.

"Sixthly.—That the Exchequer Chamber ought to have awarded to the

plaintiffs in error their costs of the demurrer to the sixth plea, or, at all events, ought not to have left them subject to the defendant in error's costs of that demurrer, thereby obliging them to pay costs on the issue of law on which they have ultimately succeeded; but ought to have given the same judgment upon that demurrer which the Common Pleas ought to have given, *856] *or, if that was impossible, to have reversed the judgment altogether.

"Seventhly.—That the jury have found damages upon the second count, —on a plea pleaded (a) to which, the defendants below have judgment.

"Eighthly.—That the award by the Exchequer Chamber, of damages, costs, and charges, by reason of the delay in the execution of the judgment as to the first count, occasioned by the writ of error, is not warranted by law; inasmuch as the statute giving costs to defendants in error, applies only to cases in which the judgment appealed against is altogether affirmed; and inasmuch as the plaintiffs in error were obliged to carry the whole record to the Exchequer Chamber, in order to reverse that part of the judgment which is now admitted to be wrong and is reversed, they ought not to be obliged to pay costs for doing that which the law obliged them to do, in order to correct the error in the judgment of the court below, especially as they can themselves obtain no costs upon the parts on which they have succeeded."

And the plaintiffs in error prayed that the judgment of the Exchequer Chamber, so far as it reversed the judgment of the Common Pleas on the demurrer to the sixth plea, might be affirmed for the following reason:—

"Because, reading the second count and the sixth plea together, it appeared that the plaintiffs in error were bailees, not responsible for loss by accidental fire."

The defendant in error submitted that the judgment of the Exchequer Chamber ought to be in all respects affirmed, for the following reasons:—

"First, with respect to the demurrers to the third and fourth pleas, because, by the contract between the parties stated in the first count, the *857] defendants below *were bound, not only to carry, but to deliver, the goods in question to the plaintiff below in the port of London; and these pleas contain neither an allegation that they did so deliver them, nor any valid excuse for not delivering them.

"Secondly, because, it being admitted on the pleas, that the goods had not been delivered, the defendants below were, in point of law, liable for the loss of the goods by accidental fire whilst in their custody as carriers and in the course of conveyance.

"Thirdly, because, although the fourth plea alleges that the defendants below were ready to deliver the goods at Fenning's Wharf, but that the plaintiff below was not ready to receive them, yet, inasmuch as neither of the pleas alleges that a landing at Fenning's Wharf was, by any valid custom of the port of London or otherwise, a delivery within the port of Lon-

(a) And see *anté*, Vol. III. p. 675, *infra*, 858, 859, n.

don, nor contains any allegation that a reasonable time for the plaintiff below to fetch the goods from Fenning's Wharf had elapsed at the time they were burnt, nor even that the plaintiff below had notice of their having arrived, or of their having been landed and of their lying at Fenning's Wharf, no legal ground is laid for supposing them to remain at the risk of the plaintiff below whilst they continued on the wharf.

“ With reference to the first exception taken in the bill of exceptions, to the admission in evidence of the bills for freight and charges, and to the other written and parol evidence respecting former transactions between the same parties, the defendant in error submits that the reason stated by the Chief Justice for their admission was a valid one, namely, that they ought to be submitted to the jury, not for the purpose of superadding any condition to, or in any manner varying or altering, the written contract, but, simply, for the purpose of ascertaining *the course and usage of delivery [858 in the port of London.

“ With reference to the exceptions taken to the charge of the Chief Justice, the defendant in error submits that the Chief Justice was correct in leaving it to the jury to say whether a delivery at Fenning's Wharf was or was not a delivery to the plaintiffs below, according to the custom of the trade within the port of London ; because issue having been joined on the precise point whether the defendants below had or had not delivered the goods to the plaintiff below at London, and inasmuch as a landing at Fenning's Wharf could amount to a delivery to the plaintiff below, only by reason of some custom or usage to that effect prevailing in the port of London, proof of a contrary usage, namely, of goods being carted to the consignee's own warehouse, almost invariably prevailing amongst the same parties, and also prevailing extensively amongst other parties and other steam companies in the port of London engaged in the same trade, was clearly evidence proper to be left to the jury, and from which the jury were justified in inferring, that no such custom or usage as that set up by the defendants below, existed.”

And, with reference to the question of costs, the defendant in error submits that, supposing the House affirmed the judgments of the courts below respecting the first count, he is entitled to retain the costs adjudged to him both in the Common Pleas and in the Exchequer Chamber, because—

“ First, the jury having on the trial been, by consent of both parties, discharged from giving any verdict on the second count, and the damages and costs having been assessed by the jury, and the costs of increase added by the court, and final judgment having been signed in the Common Pleas for those damages and *costs exclusively on the first count, and the plaintiff below having been throughout successful on the first count, [859 which was the only count on which final judgment was entered up in the Common Pleas, he is entitled not only to his costs in the court below, but also to his costs in the Exchequer Chamber by reason of the delay in getting execution for the said damages and costs, notwithstanding the opinion

expressed in the Exchequer Chamber in favour of the plaintiffs in error as to the sixth plea to the second count, on which the jury were discharged from giving a verdict.^(a)

"Secondly, if the House are of opinion that the plaintiffs in error must be considered, on this record, as having succeeded in reversing some part of the judgment of the Common Pleas, in the Exchequer Chamber, and that the judgment of the Exchequer Chamber is, on that ground, incorrect, so far as regards the costs in error, the defendant in error contends that the judgment of the Common Pleas ought to be affirmed altogether, and the full costs in error allowed to the defendant in error, on the ground that the sixth plea is, in point of law, no answer to the second count; and that the reasons above stated for holding the third and fourth pleas to be invalid, are equally applicable to the sixth plea; and that the second count states facts, and sets out a contract, sufficient to make the defendants below liable as common carriers, and consequently answerable for the non-delivery of the goods, notwithstanding they were destroyed by an accidental fire."

F. Kelly and *J. W. Smith*, for the plaintiffs in error. The main questions *860] in this case are two: first, whether "the master of a foreign ship, by landing goods at a convenient and accustomed wharf immediately on his arrival in the port of London, discharges his duty so as to relieve himself from all responsibility in respect of his contract to carry: secondly, whether, under a bill of lading in the ordinary form, evidence of former dealings between the parties is admissible to control or explain the meaning of such bill of lading.

A subordinate point will also arise, viz., whether the judgment of the Exchequer Chamber is not erroneous so far as regards the costs of the writ of error.

1. Where the master receives goods on a general bill of lading, as here, it is no part of his duty to give notice of the arrival of the vessel to the consignee of the goods; the latter is bound to watch for them. In general, the master has no means of making any communication; he may not know the place of abode of the consignee, or the latter may have parted with the bill of lading and ceased to have any interest in the goods. [Lord CAMPBELL. Have you any authority for saying that the master may land the goods as soon as the ship arrives, without giving the owner an opportunity to come and demand them?] *Harman v. Clarke*, 4 Campb. 159, shows that the consignee is not entitled to notice. [Lord BROUGHAM. The plea does not allege that the goods were landed at a place where the consignee might have had them when he pleased.] It alleges that the wharf was "a place at which goods conveyed in steamboats from the port of Dublin to the port of London, were, on their arrival at the last-mentioned port, used and accustomed to be landed and deposited, and a place fit and proper and

(a) The jury being discharged from finding what the defendant had promised, as alleged in the second count, and as denied by the plea of non assumpsit, there could be no assessment of damages, absolute or contingent, on that count.

convenient for that purpose." In *Hyde v. The Trent and Mersey Navigation Company*, 5 T. R. 389, the majority of the judges held that common carriers from A. to B., charging and receiving for cartage of goods to the consignee's house *at B., from a warehouse there where they usually unloaded, but which did not belong to them, were answerable for [*861 the loss of the goods at the warehouse by an accidental fire, though, with the knowledge of the consignee, they allowed all the profits of the cartage to another person; but three of the judges agreed that a different rule prevailed in the case of ships coming from beyond seas. Applying the rule laid down in that case to the present, had the defendants performed their undertaking when they landed the goods at Fenning's Wharf? The master is not bound either to give notice or to wait a reasonable time; to require him to do so it would operate most injuriously upon commercial transactions. In *Abbott on Shipping*, 6th ed., 246, the duty of the master on the completion of the voyage is stated to be, to report his ship and crew, to deliver his manifest and other papers to the proper officers, according to the law and custom of the place, and, without delay, to deliver the cargo to the merchant or his consignees, upon production of the bills of lading and payment of the freight and other charges due in respect of it; citing *Bishop v. Ware*, 3 Campb. 360. The learned author says, p. 248, "In England, the practice is to send such goods as are not required to be landed at any particular dock, to a public wharf, and order the wharfinger not to part with them till the freight and other charges are paid, if the master is doubtful of the payment." Again, p. 249, "The manner of delivering the goods, and consequently the period at which the responsibility of the master and owners shall cease, depend upon the custom of particular places, and the usage of particular trades. Thus, a hoyman, who brings goods from an outport into the port of London, is not discharged by landing them at the usual wharf, but is bound to take care and *send them out by [*862 land, to the place of consignment. And, if the consignee require to have the goods delivered to himself, and direct the master not to land them on a wharf at London, the master must obey the request; for the wharfinger has no legal right to insist upon the goods being landed at his wharf, although the vessel be moored against it. But in the case of ships coming from a foreign country, delivery at a wharf in London discharges the master." [Lord LYNDHURST, C. Here, it appears that the master received the goods upon a contract to deliver them to the consignee at the port of London.(a) He had no right to change the risk.]

2. The next question is, whether or not evidence of former dealings between the parties was admissible; its object being to control the bill of lading, or to explain its meaning. It was not admissible: its tendency was to enlarge the terms of the written contract: it was not offered as evidence of usage or custom; nor could it be so offered. In *Yates v. Pym*, 6 Taunt. 446, which was an action on a warranty given on a sale of prime

(a) *Anté*, Vol. III. 644, 7, 9.

singed bacon, evidence was offered to show, that, by a practice in the trade, bacon to a certain degree tainted was received as prime singed bacon; and of another practice by which the purchaser was precluded from all remedy if he did not promptly discover the objection and point it out. HEATH, J., rejected it; and GIBBS, C. J., said: "I cannot think that any custom of trade can be admissible to prove the proposition now contended for."

Assuming that the goods, after they were landed, were in the possession of the defendants below, they held them, not as carriers but as wharfingers; and this action cannot be maintained; *Garside v. The Proprietors of the Trent and Mersey Navigation*, 4 T. R. 581; *Webb, In re*, 8 Taunt. 443.

*863] If the allegation in the second count, that the contract *was to carry the goods from Belfast to Ironmonger Lane, then landing them at Fenning's wharf was a rightful act, in the due performance of the contract.

With respect to the question of costs, the declaration contained two counts. To the first count four pleas were pleaded, and to the second, two. (a) The plaintiff below demurred specially to the third and fourth pleas (to the first count,) and generally to the sixth plea (to the second count.) The Common Pleas gave judgment for the plaintiff below on all the demurrers. At the trial which afterwards took place, exceptions were tendered to the ruling of the Chief Justice upon the issues joined on the first and second pleas, and the jury were, by consent, (b) discharged from giving any verdict as to the second count. The plaintiff below thereupon taxed his costs, and signed judgment upon the whole record. The Exchequer Chamber, upon the argument of the writ of error and bill of exceptions, affirmed the judgment of the court below as to the demurrers to the third and fourth pleas (to the fourth count,) and also affirmed the ruling at the trial, but *they reversed the judgment of the Common Pleas so far as related to the demurrer to the sixth plea*. The judgment of the Common Pleas was for one entire sum for damages and costs, including, of course, the plaintiff's costs of the demurrer to the sixth plea. The plaintiffs in error ought not, under these circumstances, to have been charged, as they are by this judgment, with the costs in error. The judgment of the court below being erroneous as to part, they were perfectly justified in the course they

*864] took. The judgment for costs is clearly erroneous; *Everard v. Pateson*, 6 Taunt. 645, 2 Marsh. 304. In *Gildart v. Gladstone*, 12 East, 668, judgment having been given in the Common Pleas for the plaintiffs upon a special verdict in assumpsit, which was reversed in the King's Bench, it was held that the defendant was entitled to a judgment, not only of acquittal, but also for the costs of his defence in the former court, that being the judgment which the court below ought to have given; the defendant in such case being entitled to his costs by the statute 23 H. 8,

(a) *Three*; if non assumpsit applied to the whole declaration. Antè, III. 649, *suprà*, 859.

(b) Which appears to have been necessary; since discharging the jurors from finding a verdict upon *any* of the issues joined upon the count was equivalent to entering a *stet processus* as to that count.

c. 15. Lord ELLENBOROUGH there said: "The court is bound, *ex officio*, to give a perfect judgment upon the record before it. In this case, the judgment below was given for the plaintiffs, upon a special verdict, where, of course, there was an alternate finding by the jury, according as the court should be of opinion that the verdict and judgment ought to have been for the plaintiffs or for the defendant. This court having then been of opinion that the judgment of the court of Common Pleas was erroneous, and ought to have been for the defendant below,—which would have entitled him there to his costs on the verdict as found for him,—we should not do him all the justice which he is entitled to receive upon the record now before us, if we did not, upon reversing the judgment below, give the same judgment which the court below ought to have given, which is, a judgment for the costs of his defence in that court, as well as a judgment of acquittal." Here, a judgment having been pronounced by the Common Pleas which was erroneous as to part, the writ of error was properly brought, and the plaintiffs in error were not liable to any costs in respect thereof.

The plaintiffs in error are entitled, under the statute of Anne, to the costs of the demurrer upon which they succeeded in the Exchequer Chamber; *Hullock on Costs*, 102; and certainly under the 3 & 4 W. 4, c. 42, s. 30.

*Lord LYNCHURST, C. I am of opinion that there is no foundation for the objection to the ruling as to the admissibility of the evidence in question. It was offered, not for the purpose of enlarging or altering the terms of the contract, but merely for the purpose of anticipating a case which might be expected to be set up on the other side, to establish a usage or custom for delivery at a convenient wharf. It was offered to show how the parties themselves had, on former occasions, understood and dealt with the contract. The evidence may be open to observation, as consisting of instances of individual contracts; but it was admissible. As to the other point, my opinion is, (in which I believe all the other noble and learned lords present concur,) that the contract was to deliver *to the consignee* in the port of London. Instead of a delivery to the consignee, the goods were placed on Fenning's Wharf. There is no averment to show that such a delivery is tantamount to a delivery according to the terms of the contract. Upon these two points, therefore, I concur in the opinion expressed in the court below. As to the costs, the question is open to some difficulty. [*865]

Lord CAMPBELL. The fourth plea is clearly bad. It professes to excuse the non-performance of the contract, but it shows no ground of excuse. It does not even show that a reasonable time elapsed between the arrival of the vessel and the landing of the goods for enabling the consignee to come and receive them; or that the captain had a right to land the goods on his arrival.

The evidence was offered, not for the purpose of enlarging or altering the terms of the contract, but to explain the meaning of the parties at the time of entering into the contract. I think it was properly admitted.

Lord BROUGHAM. I also think that the evidence in question was properly admitted. It did not extend the *liability of the ship-owner. *866] It is competent to a party to meet anticipated objections by introducing evidence of this sort, which, if this course were not taken, might be altogether shut out.

Erle and Crompton, for the defendant in error. Substantially the judgment is upon the first count only, the pleas to which are confessedly no answer to the action. The judgment is for an aggregate sum for costs; the record does not show how that aggregate is made up. If the taxation was objectionable, the objection should have been taken in the court below. An interlocutory judgment has been given on three pleas; there are also issues in fact; upon those joined as to the first count, the jury have found for the plaintiff below, and costs are assessed at 40s.; as to the issue on the second count, the jury are discharged. So far as related to this latter issue, neither party would be entitled to costs. Each count is tantamount to a declaration in a separate and distinct action. The costs of increase follow the award of damages, and costs on the issues joined on the first count apply, as to which the plaintiff below altogether succeeds upon that part of the declaration to which the judgment of affirmance expressly limits itself to the first count. The plaintiff below therefore had a clear right to the costs awarded him: *Eardly v. Turnock*, Cro. Jac. 636; *Frederick v. Lookup*, 4 Burr. 2018. [Lord CAMPBELL. The judgment of the Common Pleas improperly included the costs of the demurrer to the sixth plea.] The judgment as to those costs was interlocutory, and a writ of error does not lie for that: *Samuel v. Judin*, 6 East, 333.

The judgment, as to the sixth plea, was reversed upon the ground that the second count did not state that the defendants below were common carriers. The defendants were clothed with the character of common *867] *carriers until actual delivery of the goods to the consignee: *Hyde v. The Trent and Mersey Navigation Company*, 5 T. R. 389; *Bishop v. Ware*, 3 Campb. 360; *Coats v. Chaplin*, 3 Q. B. 483; *Abbott on Shipping*, 7th ed., 372 *et seq.* It was not necessary to declare against them as such: *Pozzi v. Shipton*, 8 Ad. & E. 963, 1 P. & D. 4; *Ansell v. Waterhouse*, 6 M. & S. 385; *Latham v. Rutley*, 2 B. & C. 20, 3 D. & R. 211.

Kelly was heard in reply.

Lord LYNDBURST, C. The judgment of the Common Pleas being reversed as to part, and, as I think, properly so, the plaintiffs in error were justified in bringing their writ of error; and consequently the plaintiff below was not entitled to the costs of those proceedings, which are allowed at 311*l.*

Lord CAMPBELL. I am of the same opinion. If the Common Pleas were right in their decision upon the demurrer to the sixth plea, they were bound to give the plaintiff below the costs of that demurrer when final judgment was pronounced: and we must assume that they did so. That judgment having been partially reversed by the Exchequer Chamber, upon

grounds which appear to me to be satisfactory—the second count charging the defendants, not as common carriers, but as bailees for hire and reward to do a particular act—that court ought to have relieved the defendants below from the costs with which, by the judgment of the court below, they were charged in respect of the sixth plea. The award of the 311*l.* costs in error, is manifestly wrong.

Lord LYNDBURST, C. We must reverse the judgment of the Exchequer Chamber so far as relates to the *awarding of 311*l.* for damages and costs to the plaintiff below for the delay occasioned by the writ of error. The damages and costs awarded by the Common Pleas should also be reduced by the amount of the costs of the demurrer to the sixth plea. No costs to be allowed here. [*868]

The ultimate judgment was entered in the following form :—

“ On which day, before the High Court of Parliament aforesaid, come, &c. : whereupon, all and singular the premises being seen and by the same court now here fully understood, and as well the record and proceedings aforesaid, and the judgment thereon given, as the matters and causes by the said R. Bourne, &c., above assigned for error, being diligently examined and inspected, and mature deliberation thereon had, it appears to the same court now here, that, in the record and proceedings aforesaid, and in the giving of the judgment of the said court before her justices of the Bench at Westminster aforesaid, and in the affirming thereof in part as aforesaid, and in the giving of the judgment of the said court of the lady the queer before the justices and barons, in the Exchequer Chamber aforesaid, there is manifest error ; therefore it is considered by the said court of Parliament now here, that so much of the judgment given in the said court before the justices of the Bench at Westminster aforesaid as awards 734*l.* to the said S. Gatcliffe for his costs and charges adjudged of increase to the said S. Gatcliffe ; and also the judgment of the Exchequer Chamber in so far as it affirms the said judgment of the Common Pleas, be reversed, annulled, and entirely set aside : And it is further considered that the said S. Gatcliffe do recover against the said R. Bourne, &c., his damages and costs by the said jury in *form aforesaid assessed, together with 729*l.*(a) for his costs and charges of increase in the said court of Common Pleas about his suit in respect of the first count of his said declaration ; making the damages, costs, and charges, in the whole, 1511*l.* : And it is further considered that so much of the said judgment of the said court before the justices and barons in the Exchequer Chamber aforesaid, as adjudged 311*l.* to the said defendant in error for his damages, costs, and charges, which he had sustained and expended by reason of the delay in the execution of the said judgment of the said court before the justices of

(a) The sum of 734*l.* awarded for costs in the court of Common Pleas, is here reduced to 729*l.* by deducting the costs of the demurrer to the sixth plea, amounting to 5*l.*, to which costs the defendants below became entitled upon the judgment in the court of Common Pleas against them as to that plea being reversed.

the Bench at Westminster aforesaid as to the said first count, on pretence of prosecuting the said writ of error, be reversed, annulled, and entirely set aside: And it is further considered that in all other respects the said judgment of the court of Exchequer Chamber, and so much of the judgment of the court of Common Pleas as is therein affirmed, be affirmed and stand in full force and effect:

"And thereupon the record aforesaid, and also the process had in the court of Parliament aforesaid on the premises, are sent back by the said court of Parliament to the said court before the justices of the Bench at Westminster aforesaid, to do execution thereupon, &c."

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***870] *The STOCKTON and DARLINGTON Railway Company v. BARRETT. Sept. 4.**

In railway acts any ambiguity in a clause imposing tolls or duties, is to be construed against the company, and in favour of the public.(a)

By a railway act (1 & 2 G. 4, c. xlv. s. 62.), a company thereby incorporated (the Stockton and Darlington Railway Company) were empowered to demand for articles conveyed by their railway:—"For all coal, &c., such sum as the company shall appoint, not exceeding 4d. per ton per mile:" "For all, &c., articles for which a tonnage is *hereinbefore* directed to be paid, which shall pass the inclined planes upon the said railway, such sum as the company shall appoint, not exceeding 1s. per ton:" "And for all coal which shall be shipped in the port of Stockton-upon-Tees aforesaid, (the only previous mention of the port being in sect. 1, where it is described as the port and town of Stockton-upon-Tees,) for the purpose of exportation, not exceeding one halfpenny per ton per mile."

Under the authority of a subsequent act (9 G. 4. c. lxi.) another railway company (the Clarence Railway Company) constructed a railway from a place on the river Tees, called Port Clarence, communicating with the Stockton and Darlington Railway at a place called Sim-Pasture.

Held, that coal shipped for London was chargeable only with the duty of one halfpenny per ton per mile, as being coal "shipped for the purpose of exportation."

Held, also, that coal shipped for exportation was liable to the inclined-plane charge.

Held, also, that Port Clarence and Middlesborough, both ports in the river Tees, and within the legal limits of the port of Stockton-upon-Tees, were, for this purpose, within the port of Stockton-upon-Tees.

THE court of Exchequer Chamber, having affirmed (b) the judgment of the court of Common Pleas(c) in this case, the plaintiffs in error brought a writ of error in parliament upon the judgment of affirmance.

The two following errors were assigned in the House of Lords:—

1. "That it appears by the record aforesaid, that, in and by the judgment aforesaid, it was and is adjudged that the said company were not legally entitled to charge for the tonnage of the said coals in and by the said verdict in that behalf, found to have been carried and *conveyed
*871] along the said railway of the said company, to Sim-Pasture in the special verdict mentioned, and thence along the said Clarence railway to Port-Clarence aforesaid, within the said port of Stockton, and there shipped to be conveyed to the port of London aforesaid for consumption there,

(a) Vide *Parker v. The Great Western Railway Company*, antè, 253.

(b) Vide antè, Vol. III. p. 956, 3 Scott, N. R. 803.

(c) Vide antè, Vol. II. p. 134, 2 Scott, N. R. 337.

more than after the rate of one halfpenny per ton per mile ; whereas, by the law of the land, and according to the statutes in the said verdict in that behalf mentioned, some or one of them, the said company, were legally entitled to charge more than one half-penny per ton per mile, for and in respect of the tonnage of such coals.

2. "That the judgment aforesaid by the record aforesaid appears to have been given for the plaintiff (below) to have and maintain his said action against the said company for the sum of 705*l.* 8*s.* 4*d.* within-mentioned ; whereas, by the law of the land, judgment ought to have been given for the said company against the plaintiff (below) in respect of the last-mentioned sum of money."

The case was argued in May last, by Sir *W. Follett*, Attorney-General, for the plaintiffs in error, and by Sir *T. Wilde*, Serjt., for the defendant in error.

The principal clauses cited were, sect. 62 of the 1 & 2 G. 4, c. xlv., by which it is enacted that "it shall be lawful for the company, from time to time, to ask, demand, &c., for the tonnage of all goods and other things which shall be carried or conveyed upon the said railways or tramroads, the rates, tolls, and duties thereafter mentioned, that is to say :

1. "For all limestone, materials for the repair of turnpike-roads, or highways, and all dung, compost, and all sorts of manure, except lime, which shall be carried or conveyed upon the said railways or tramroads, such sum as the said company shall, from time *to time, direct or appoint, not exceeding 4*d.* per ton per mile :"

[*872

2. "For *all coal*, coke, culm, cinders, stone, marl, sand, lime, clay, ironstone, and other minerals, building-stone, pitching and paving-stone, bricks, tiles, slates, and all gross and unmanufactured articles, and building materials, such sum as the said company shall, from time to time, direct and appoint, not exceeding 4*d.* per ton per mile :"

3. "For all lead in pigs or sheets, bar-iron, wagon-tire, timber, staves, and deals, and all other goods, &c., such sum as the said company shall, from time to time, direct and appoint, not exceeding 6*d.* per ton per mile :"

4. "For all the articles, for which a tonnage is *hereinbefore* directed to be paid, which shall pass the inclined-planes upon the said railways or tramroads, such sum as the said company shall appoint, not exceeding 1*s.* per ton :"

5. "And for all coal which shall be shipped on board of any vessel in the port of Stockton-upon-Tees aforesaid, for the purpose of exportation, such sum as the said company shall appoint, not exceeding one halfpenny per ton per mile."

The sixtieth section of the 9 G. 4, c. lxi., which imposes upon all coal, &c., carried upon the Clarence Railway "for exportation," such duty or toll as the company shall, from time to time, appoint, not exceeding $\frac{3}{4}$ *d.* per ton per mile, and, for coal, &c., carried upon the said railway, "for home-consumption," exceeding $1\frac{1}{2}$ *d.* per ton per mile ; and the 37th of the 10

G. 4, c. cvi., (for, amongst other things, amending the last-mentioned act,) which enacts "that all coal, &c., which shall be shipped on board any vessel in the river Tees, and entered at the custom-house of the port of Stockton-upon-Tees, shall be deemed and taken to be for exportation, under the recited act and this act."

*873] *And the 21st section of the 4 G. 4, c. xxxiii., which is as follows: "And whereas, by the recited act, [1 & 2 G. 4, c. xlv., s. 62,] the said company were authorized and empowered, from time to time, and at all times thereafter, to ask, demand, sue for, recover and receive, for the tonnage of all articles, matters and things, for which a tonnage-duty was *therein* directed to be paid, which should pass the inclined-planes upon the said railways or tramroads, such sum as the said company should appoint, not exceeding 1s. per ton: and whereas at the time of the passing of the recited act, it was understood and considered that one inclined-plane only would be necessary upon the said railways or tramroads thereby authorized to be made; but inasmuch as, by reason of the deviations and alterations hereby authorized to be made, and by which it appears the length of the said railways or tramroads will be shortened three miles, or thereabouts, a greater number of inclined-planes will be requisite: be it enacted, &c., that it shall be lawful to and for the said company, from time to time, to ask, demand, &c., for all articles, &c., which shall pass one or more of the inclined-planes upon the said railways or tramroads, such sum as the said company shall appoint, not exceeding the like rate or sum of 1s. per ton for and in respect of each of the said inclined-planes *over and above and in addition to the rates, tolls, and duties by the recited act and this act imposed, or authorized to be taken and received, for goods and other things which shall be carried or conveyed upon the said railways or tramroads.*"

Lord LYNTHURST, C. My lords: The first question argued at the bar in this case, as well in the court below as before your lordships, relates to the meaning of the terms "shipped for exportation," in the Stockton and Darlington Railway Act, whether they are *confined to exportation to foreign countries, or include shipments made coastwise. I see no reason for adopting the narrower interpretation. The terms are large enough to comprehend both; and, if it were a case of doubt, the rule, in acts of this nature, is, to adopt that construction which is most beneficial to the public. I may further observe, that, the home market for this article would probably have been at least as much in the contemplation of the legislature as the foreign.

The second question is, whether the duty upon coal shipped for exportation is imposed in addition to the duty payable for all coal carried along the railway—whether it is cumulative. I think it is not. I consider that coal so destined was meant to be excepted from the general rule, and to be subject to a lower amount of duty. If it had been intended that both duties should be payable, words should have been added, as is usual in such cases, to denote that intention. It is urged that, as all coals are liable to a

toll not exceeding 4d. a ton per mile, and as a duty is imposed on coals shipped for exportation, the latter duty must be cumulative. It is sufficient, in order to satisfy these terms, to observe that it is provided that the duty upon all coal shipped for exportation shall not exceed $\frac{1}{2}$ d., which is inconsistent with the supposition of this duty being in addition to the former rate. In a case of doubt, the same rule would apply here as upon the construction of the former terms.

The third question relates to the place of shipment. The reduced toll is payable for all coal conveyed along the railway and shipped on board any vessel in the port of Stockton-upon-Tees for the purpose of exportation. Several quantities of coal were conveyed along the railway to its junction with the Clarence Railway, and thence, along the latter railway, to Port Clarence, where it was shipped to London. Port Clarence is within the limits of the port of Stockton-upon-Tees. It is contended *by the [*875 plaintiffs in error that they are not, under these circumstances, confined to the reduced duty; that such reduced duty is limited to cases where the coal is carried along the line to its terminus at or near Stockton; that the "port of Stockton-upon-Tees" means "the town and port of Stockton," and not the port of Stockton in its more extended sense, and which includes Hartlepool, Seaham, and other places several miles distant from the town of Stockton; that the words of the act are "the port of Stockton-upon-Tees *aforesaid*," and have reference to the preamble, in which the port is always mentioned in connection with the town—the *town and port* of Stockton-upon-Tees. But the words of the clause by which the duty is imposed make no mention of the town. The duty is, upon coals "shipped on board of any vessel in the *port* of Stockton-upon-Tees *aforesaid*:" the word of reference has not, therefore, I think, the effect contended for by the plaintiffs. Nothing in the act requires the coal to be carried along the whole line; the duty is payable by the mile; and the parties may, I think, leave the railway at any convenient point, paying only the reduced duty, provided the coals are shipped within the port, for exportation. The case comes within the words of the act; and there seems to be no reason for adopting a more restricted interpretation, for the benefit of the company by whom the act was obtained.

The remaining question relates to the duty for passing the "Brusseton Inclined Plane," viz., whether it is payable in respect of coals exported. It is payable for "all the articles, matters, and things for which a tonnage is thereinbefore directed to be paid." It is cumulative, and payable without reference to distance. But all coals are before mentioned. It would therefore apply to them. It is true that a lesser duty is afterwards assigned to coals shipped for exportation: but *this, I consider, is merely a [*876 reduction, under special circumstances, of the former duty, and does not prevent the charge for the inclined plane attaching.

I think, therefore, that the judgment of the court below must be affirmed.

LORD BROUGHAM. I concur in the opinion just expressed. This is a writ of error upon a judgment of the Exchequer Chamber, affirming a judgment of the Common Pleas in favour of the plaintiff below in an action of assumpsit brought by him to recover back 705*l.* 8*s.* 4*d.*, 404*l.*, and 20*l.*, which had been exacted by the company in respect of a toll of more than one halfpenny per ton per mile, along the Stockton and Darlington Railway, and for the transit of coals over an inclined plane ; such coals being shipped for exportation at places within the port of Stockton-upon-Tees.

Upon a special verdict at the trial, the court of Common Pleas gave judgment that the company were entitled to take the additional tonnage in respect of the transit of coals along the inclined-plane, but were not entitled to exact more than one halfpenny per ton per mile, for carrying coals along the railway ; and that therefore the plaintiff below was entitled to recover back the sum of 705*l.* 8*s.* 4*d.*, but not either of the sums of 404*l.* or 20*l.* This judgment being affirmed in the Exchequer Chamber, the present writ of error was brought.

Of the five questions raised in the course of these proceedings, two are now given up, and one—the question as to the port of embarkation—seemed so clear to your lordships that the learned counsel for the defendant in error was stopped from going into it. The questions abandoned are upon the right of the company to charge one halfpenny per ton under the fifth article of the 1 & 2 G. 4, c. xlv. s. 62, cumulatively with the 4*d.* under *S77] the second article ; and the right of the company *to charge 1*s.* a ton for passing over the inclined-plane, where one halfpenny per ton is charged ; and not merely to take that one halfpenny. The latter of these points had been given by the judgment below against the plaintiff (now defendant in error) ; and he no longer resists the judgment in this particular. The first had been found for him ; and the plaintiffs in error now abandon their objection to it. Then, it having been contended for the plaintiffs in error, that the coals having been found by the special verdict, to have been shipped by the plaintiff below for carriage to London, and therefore for home consumption, this does not come within the meaning of the word “exportation” in the clause or article which restricts the company to charge of one halfpenny per ton on coal shipped for exportation on board of vessels in the port of Stockton-upon-Tees, it seemed clear that no such construction could be put upon the word as would exclude a shipment in that port to be carried coastwise to London—which the special verdict found to be the case here.

The remaining two questions alone stand for decision, and to those my noble and learned friend has applied himself ; and I come to the same conclusion with him upon them. These are—first, Does “Stockton-upon-Tees” mean the *town* or the *port* of Stockton ; the shipment in question having been made at Port-Clarence, which is found also to be within the port, but not within the town ; and, secondly, has the company any right to charge 1*s.* or any other sum above the one halfpenny ? This latter ques-

tion in reality resolves itself into the first; at any rate, it is immaterial if the first be plainly against the company.

The main question, then, relates to the meaning of the words in the act, "the port of Stockton-upon-Tees aforesaid." These words occur in the fifth article of the 62d section of the 1 & 2 G. 4, c. xlv., which fifth article "is an excepting clause; and it is very material to keep in view, [878 with reference to the question in this case, that it is a clause excepting from a duty. The only previous mention of the port is in the preamble, which, in mentioning the termini of the proposed railway, describes one as "the river Tees, at or near Stockton." Now, in this place, doubtless, the town is intended, because the river Tees is mentioned, on which it stands; and it would be insensible to give it any other construction. But no mention is here made of "port" at all: the town alone is mentioned. Afterwards, mention is made of the "town of Stockton-upon-Tees." Here, of course, there can be no doubt. Hitherto nothing is said of the port. But then we have mention made of it: and how? It is said that the projected railway will be useful, by "facilitating the conveyance of coal, iron, lime, corn, and other commodities from the interior of the county of Durham to the town of Darlington, and to the town *and port* of Stockton;" and "also the conveyance of merchandise and other commodities from the said town *and port* of Stockton to the town of Darlington and into the interior of the county of Durham." Here, is a totally different phraseology, and respecting a different subject-matter, viz., the commerce of the place; accordingly, we here find the "port" as well as the "town" mentioned, whereas the town only was mentioned when the question was as to the termini of the railway. This may reasonably, therefore, be intended to mean—whatever goes by the name of the port of Stockton; and the "port of Stockton" is, by the special verdict, found to include Port-Clarence, which is five miles, and Hartlepool, which is twelve miles from the town of Stockton; and Seaham is included, which is twenty-two miles distant. It seems quite impossible, therefore, to limit the words in the fifth article in the 62d section, "port of Stockton-upon-Tees aforesaid," by *the [879 first two mentions of the town in the preamble, nothing being said in those two places of the *port*, which is only mentioned when there is a statement of traffic to and through the port, which may very well mean the *whole* port: and so the words in the preamble, at the utmost, leave whatever doubt arises on the enacting clause unsolved: it is only *idem per idem*. It must be observed that, *in dubio*, you are always to lean against the construction which imposes a burden on the subject: the intention of the legislature to impose a tax, must be clear: it was so held in the case of *The Hull Dock Company v. Browne*, 2 B. & Ad. 58, which both parties in this case relied on for other purposes, and which the plaintiffs in error especially cited in support of their view. "These rates," said Lord TENTERDEN, "are a tax upon the subject; and it is a sound general rule that a tax shall not be considered to be imposed, (or, at least, not for the benefit of a

subject,) without a plain declaration of the intent of the legislature to impose it." The like law was laid down, by the court of King's Bench, in the case of a company claiming against the public—*Gildart v. Gladstone*, 11 East, 675, where Lord ELLENBOROUGH said (p. 685): "If the words would fairly admit of different meanings, it would be right to adopt that which would be more favourable to the interest of the public and against that of the company; because the company, in bargaining with the public, ought to take care to express distinctly what payments they were to receive, and because the public ought not to be charged unless it be clear that it was so intended." Many other cases might be cited which concur in the same reasonable view. But here, the question is of an exemption or restriction of the duty imposed. The article in question restricts the mileage

*880] duty on export coal, to one halfpenny, being less by $3\frac{1}{2}d.$ than the second article allows, making it one-eighth part only of the tax.

Therefore, according to the authorities just cited, we are to lean in favour of the construction, where it is doubtful, which, by extending the limits of the port, enlarges the bounds of the exemption from the tax.

Now, as to the import of the case of the *The Hull Dock Company v. Browne*. On the first question generally, it has really no bearing whatever in favour of the contention of the plaintiffs in error, except that it is a case where a "port" was held not to comprise all other ports, which, for certain specific purposes—revenue purposes—are known and held to belong to it. The grounds on which this was held are clear and satisfactory; and not one of them is to be found in this case, if it be not the general rule, already referred to, against construing doubtful clauses in favour of the company; which rule clearly does apply here—applies to include, not to exclude, Port-Clarence within the port of Stockton-upon-Tees; and that is the only part of the decision in the case of *The Hull Dock Company v. Browne*, which has the least application to this case. That the other parts of the case have no application, is quite clear. Thus in that case there were cited the returns to two commissions, one *in temp. Eliz.*, the other *in temp. Charles II.*: by the former it is found that Scarborough, Grimsby, York, and other ports, are not within Hull, but are members of the port of Hull; York being forty miles off, or thereabouts: by the latter—a return to the commission in the time of Charles II., it is said by the crown, "Our members of Hull," that is to say, Scarborough, and others; Hull having been long since granted to the corporation by the Crown—certainly as early as the reign of Richard the Second; possibly, according to the argument of the corporation, as early as the time of Edward the First. *This plainly indicates that

*881] the word "*Our members*" applied to the creeks or out-ports, and not to Hull, because Hull was not "*Our member*" or "*Our port*." It appeared, too, that for all the Humber, all the Trent, and all the Ouse—comprising many places of trade, many ports—there is but one custom-house, that at Hull. This explains why they are called "*members of Hull*" for revenue purposes, and for none other." Lastly, two other acts of par-

liament—of 41 G. 3, and 45 G. 3—were referred to in that case; in which the words “port of Kingston-upon-Hull” were employed, when it was quite plain that the port of the town of Hull alone could be intended. The case, therefore, of *The Hull Dock Company v. Browne* is completely distinguishable from the present; and the import of that case is truly in favour of, and not in opposition to, the judgment of the court below.

I therefore concur in the motion of my noble and learned friend, that the judgment in this case must be for the defendant in error, and with costs.

Judgment affirmed, with costs.

*IN THE EXCHEQUER CHAMBER.

[*882

WILMSHURST and Another *v.* BOWKER and Another. (*a*) Feb. 3.

B. sold to **A.** wheat, the price to be paid by banker's draft on London at two months, to be remitted on receipt of invoice and bill of lading, which **B.** shipped by order of **A.**, to be carried to **M.** *for the account and at the risk of A.*, there to be delivered to **A.**; **B.** delivered the wheat to the master of the vessel, who took possession thereof; the master signed a bill of lading to deliver the wheat to the order of **B.**, *who endorsed such bill of lading to A.*, and made an invoice, and sent the invoice and bill of lading to **A.** in a letter, requiring **A.** to remit in course, which letter, with the invoice and bill of lading, were received by **A.** **A.** having received the bill of lading and invoice, and having failed to remit the banker's draft, **B.** assumed to revoke and rescind the sale, and caused *the wheat to be stopped in its passage to A., &c.*

Held, reversing the judgment of the court of Common Pleas, that, by the delivery of the wheat to the master of the vessel for the account and at the risk of **A.**, and the transmission of the endorsed bill of lading, **B.** had so parted with the property and right of possession as not to be entitled to intercept the delivery. (*b*)

CASE for a wrongful stoppage *in transitu*, of wheat sold by the defendants to the plaintiffs.

The first count of the declaration stated, that on 25th October, 1836, the plaintiffs bargained with the defendants to buy of them, and the defendants then sold to the plaintiffs, 500 quarters of wheat, at 51s. per quarter; that the wheat being so sold, afterwards, to wit, on the 27th October, 1836, the defendants, by order of the plaintiffs, caused the wheat to be shipped, and the same was then shipped on board of a certain vessel then lying in the port of Lynn, called *The Ramsgate*, of which **W. Lightowler** was then master, to be carried on board the said vessel from Lynn aforesaid to Maidstone, in the county of Kent, *for the account and at the risk of the plaintiffs*, and there, to wit, at Maidstone aforesaid, to be delivered to the plaintiffs; *that the defendants then parted with the possession of the wheat, and delivered the same out of their possession* to **Lightowler** on board of the *said vessel; and **Lightowler** then received the wheat and had the possession of the same for the purposes aforesaid; that afterwards and after 'he

(*a*) 5 New Cases, 541, 7 Scott, 561.

(*b*) Vide *antè*, Vol. II. pp. 792, 803, Vol. III. p. 101.

said delivery of the wheat to Lightowler, to wit, on the day and year last aforesaid, Lightowler, then having the possession of the said wheat on board of his vessel, as such master of the said vessel, made a certain bill of lading, and thereby acknowledged the shipping and delivery to him Lightowler, of the wheat on board of the said vessel, and undertook, on the arrival of the said vessel at Maidstone, to deliver the wheat to the order of the defendants; that Lightowler then delivered the said bill of lading to the defendants, who then endorsed the same to the plaintiffs; that the defendants then also made a certain invoice of the wheat, and thereby and therein declared the wheat to be shipped on board the said vessel for Maidstone, *by order, and for the account and risk, of the plaintiffs*; that the defendants then also wrote and addressed to the plaintiffs a certain letter, thereby stating and expressing, and advising and informing the plaintiffs, that they begged to hand the plaintiffs the invoice and bill of lading of the plaintiffs' order of wheat, per Captain Lightowler; and thereby then also requested that, to the amount, the plaintiffs would add the charge for insuring the wheat, and remit the same to the defendants in due course; and the defendants then enclosed the invoice and bill of lading, so endorsed to the plaintiffs as aforesaid, in the said letter, and then addressed and sent the said letter, with the said invoice and bill of lading therein enclosed, to the plaintiffs; that the plaintiffs afterwards, to wit, on, &c., aforesaid, received the said letter, invoice, and bill of lading, and then became and were, and thenceforward had been, and still were, the owners thereof respectively; that the defendants, before and at the time of the committing of the grievances thereafter

*884] next mentioned, had notice *of all the premises; that, nevertheless, afterwards, and after the delivery of the wheat on board of the said vessel to Lightowler, so being master thereof as aforesaid, for the account and at the risk of the plaintiffs as aforesaid, and after the sending of the said invoice and bill of lading so endorsed as aforesaid, to wit, on, &c., aforesaid, the plaintiffs then being the holders of the said bill of lading, *and not being bankrupts or insolvents*, but being then lawfully entitled to have the wheat delivered by Lightowler to them the plaintiffs, the defendants, well knowing the premises, but contriving and intending to injure and defraud the plaintiffs, did not nor would suffer or permit the wheat to be delivered to the plaintiffs, but wrongfully and injuriously, without the license or consent and against the will of the plaintiffs, then *revoked and rescinded the said sale of the wheat to the plaintiffs, and then caused and procured the wheat to be stopped in its passage to the plaintiffs*, and forthwith, upon such stoppage, and without the plaintiffs' having notice thereof, or of their intention so to do, prevented the same from being then, or at any time afterwards, delivered to the plaintiffs; whereby the plaintiffs then wholly lost the wheat, and by reason thereof were then deprived of sundry great gains and profits which otherwise would have arisen and accrued to them by reselling it at a much higher and advanced price, as they otherwise might and would have done; and also, by means of the premises, after the sale of the wheat to the

plaintiffs, and the sending and delivery to, and the receipt by, the plaintiffs of the said invoice and bill of lading as aforesaid, to wit, on, &c., aforesaid, and on divers days, &c., the plaintiffs confiding in and expecting the delivery of the wheat to them, entered into contracts and bargains with divers persons for the sale and delivery to them respectively, on the several days and times last aforesaid, of divers large portions of the wheat, [*885 and especially with one J. Bunyar for the sale and delivery of 200 quarters of the wheat to him the said J. Bunyar, and also with certain persons carrying on business as millers under the style and firm of Boorman and Wild, for the sale to them of divers, to wit, 200 other quarters of the said wheat; but, by reason of the non-delivery of the same to the plaintiffs, the plaintiffs, for want of the same, afterwards, to wit, on the several days and times last aforesaid, were forced and obliged to break their said contracts, and made default in the delivery to the said John Bunyar and the said Boorman and Wild of a great part, to wit, 100 quarters each, of the wheat so sold to them respectively by the plaintiffs; whereby the said J. Bunyar and the said Boorman and Wild then respectively sustained great loss, to wit, to the amount of 200*l.* each, which loss they the plaintiffs, by reason of the premises, then became, and were, and still were liable, and had been and were called upon, to pay and make good to the said J. Bunyar and the said Boorman and Wild respectively; and, as to other part, to wit, 200 other quarters of the wheat so sold to J. Bunyar and Boorman and Wild respectively, the plaintiffs, for the purpose of delivering the same to J. Bunyar and to Boorman and Wild according to their said contracts in that behalf, were then forced and obliged to buy, and did then buy, the last-mentioned quantity of wheat at a much higher price than that at which they had so bought the said wheat from the defendants as aforesaid, and were also then forced and obliged to deliver, and did then deliver, to J. Bunyar and Boorman and Wild divers large quantities of wheat, amounting in the whole to 200 quarters, of much greater value, to wit, of the value of 800*l.* more, than the value of the same quantity of the wheat so prevented by the defendants from being delivered to the plaintiffs, as aforesaid, and which the plaintiffs would *otherwise have delivered to J. Bunyar and Boorman and Wild, and the plaintiffs were thereby then [*886 put to great inconvenience and expense, &c.

The declaration contained also a count in trover.

To the first count the defendants pleaded,

First, not guilty.

Secondly, that the plaintiffs did not bargain with the defendants to buy of them, nor did the defendants sell to the plaintiffs, the wheat in the declaration mentioned at the price in that behalf therein mentioned, *modo et forma*—concluding to the country.

Thirdly, that, upon the said 25th of October, 1836, the plaintiffs bargained with the defendants to buy, and the defendants then sold to the plaintiffs, the quantities of wheat in the said first count mentioned, at and

for the price in that behalf in the first count alleged, upon the terms and conditions for the payment thereof as follows; (that is to say,) that the payment thereof should be made by banker's draft on London, at two months' date, to be remitted by the plaintiffs to the defendants upon receipt, by the plaintiffs, of the invoice and bill of lading; that the defendants then caused the wheat to be shipped on board of the said vessel, and the possession thereof to be delivered to the said master, in pursuance of the said bargain, to be by him carried to Maidstone aforesaid, and to be there delivered to the plaintiffs according to the said agreement and the terms and conditions thereof: that the plaintiffs, upon the day and year in that behalf in the said first count alleged, and before the committing of the supposed grievances, received the said invoice and bill of lading; but did not nor would, upon the receipt of the said invoice and bill of lading, remit or tender, or offer to remit, to the defendants, any banker's draft on London for the payment of the price of the wheat, but, on receipt of the said invoice and bill of lading, wholly failed and neglected *so to do, contrary to their said *887] agreement in that behalf: whereupon the defendants caused and procured the wheat to be stopped, and then prevented the same from being delivered to the plaintiffs, and they lawfully might for the cause aforesaid;—verification.

The plaintiffs joined issue on the first and second pleas, and replied *de injuriâ* to the third.

Upon the count in trover the defendant had judgment upon demurrer to the pleas to that count.(a)

At the trial of the issue before MAULE, J., at the adjourned sittings in London after Michaelmas term, 1839, a verdict was entered for the plaintiffs upon the first and second, and for the defendants on the third issue.

In Hilary term, 1840, a rule nisi was obtained on the part of the plaintiffs for judgment *non obstante veredicto*. Cause was shown against this rule at the sittings *in banco* after Hilary term, 1841, and in Easter term the court pronounced judgment, discharging the rule on the ground, that no right to the possession of the wheat was to vest in the plaintiffs before the remittance by them of a banker's draft on London; and that, on non-performance of that condition, the defendants were justified in intercepting the delivery.(b)

The plaintiffs brought a writ of error, and assigned errors, which were now argued before Lord ABINGER, C. B., PARKE, B., PATTESON, J., ALDERSON, B., COLERIDGE, J., ROLFE, B., WIGHTMAN, J.

M. D. Hill, (with whom was *Bull*,) for the plaintiffs. This action was brought against the defendants below, who are also the defendants in error, for wrongfully stopping *in transitu* wheat sold by them to the plaintiffs. The declaration states that the defendants, without the license and against *888] the will of the plaintiffs, *revoked and rescinded the sale*, and caused *the wheat to be stopped in its passage to the plaintiffs*, and forthwith,

(a) Vide 5 N. C. 541, 7 Scott, 461.

(b) Antè, Vol. II. p. 792, 3 Scott, N. R. 272.

upon such stoppage, and without giving notice of their intention, hindered the wheat from being delivered to them; *per quod* they sustained certain damage. [ALDERSON, B. One of the parties to a contract cannot *rescind* it.] The third plea to this count states in substance, that the plaintiffs bought and the defendants sold the wheat, upon these terms and conditions, "that the payment thereof should be made by banker's draft on London at two months' date, to be remitted by the plaintiffs to the defendants upon receipt by the plaintiffs of the invoice and bill of lading;" that the plaintiffs received the invoice and bill of lading, but did not remit or offer to remit any banker's draft on London, but failed and neglected so to do, contrary to their agreement.

The first question is, whether, after the constructive delivery stated in the declaration, the defendants could stop the wheat *in transitu*, upon the grounds set forth in the third plea. That the property in the wheat vested in the plaintiffs, is clear: and the stoppage cannot be justified on the ordinary ground, which, as stated in the judgment of the court below, is limited to cases of bankruptcy or insolvency in the vendee. The contract between the parties cannot be put higher than this—that the defendants were not bound to part with the possession of the bill of lading until they had received a banker's draft. [PARKE, B. They might have endorsed the bill of lading specially, or they might have transmitted it to an agent, with instructions to hand it over to the plaintiffs against the banker's draft.] By the general endorsement and delivery of the bill of lading, the defendants waived the condition and destroyed their right to stop *in transitu*. But the provision as to the banker's draft was inserted merely for the purpose of fixing the terms, and the time of payment. It was not *intended [889 to operate as a condition precedent. Upon the defendants' construction there would be an inconsistency in the terms of the contract: the banker's draft could not be sent until after the arrival of the bill of lading and invoice. [Lord ABINGER, C. B. An uncertain sum, viz., the amount of the insurance, was to be added to the invoice price.] The court below say: "We are of opinion that the intention of the parties under this contract was, that the consignors should retain the power of withholding the actual delivery of the wheat, in case the consignees failed in remitting the banker's draft, not upon the delivery of the wheat, but on the receipt of the bill of lading, which, in the ordinary course of business, would precede the arrival or delivery of the wheat. And we think the object of making the receiving of the invoice and bill of lading, and the remitting of the banker's draft, to be simultaneous or concurrent acts, could have been no other than to afford security to the consignors; so that, in case the consignees failed in the performance of their stipulation, the consignors might withhold the actual delivery of the cargo." That clearly is a misconception of the true nature of the contract. [PARKE, B. The *property* vested in the plaintiffs on the delivery of the wheat to Lightowler.] The delivery of Lightowler, and the transmission of the bill of lading endorsed, gave the plaintiffs both

the property and the possession, subject to be divested in the event of bankruptcy or insolvency—by analogy to the doctrine of revendication.(a)

If the master refused to re-deliver the wheat to the defendants, they could have had no remedy against him. (Here, he was stopped by the court.)

Greenwood, for the defendants. The contract was a contract of sale upon *890] special terms which have not *been complied with. The rule that a delivery to a carrier for the account and risk of the vendee, is a delivery to the vendee himself, subject to the vendor's right to stop the goods in transitu in case of insolvency or bankruptcy, applies only where there are no special terms of payment. This case has been twice before the court of Common Pleas, and on both occasions it was held that the intention of the parties, to be collected from the terms of the contract was, that the remitting of the banker's draft and the receipt of the bill of lading and invoice should, at least, be simultaneous acts. A third party to whom the bill of lading had been endorsed for value, would have been entitled to the possession of the wheat notwithstanding the plaintiffs had failed to remit the banker's draft: but it is otherwise as between the original parties. [Lord ABINGER, C. B. No doubt, where goods are sold upon a condition,(b) the property does not vest until the condition is performed. ALDERSON, B. You infer that, when the plea does not state that it was part of the contract, that the property should not vest in the vendees until they had remitted a banker's draft. PARKE, B. Or rather a right to retake the goods on breach of a condition subsequent.] In *Brandt v. Bowlby*, 2 B. & Ad. 932, the facts were very much like those of the present case, and it was held that by reason of the breach by the vendees of their engagement to accept bills for the price, the property did not vest. [Lord ABINGER, C. B. There the goods remained in the hand of the vendor's agent. PARKE, B. In *Ogle v. Atkinson*, 5 Taunt. 759, 1 Marsh. 323, A. being indebted to the plaintiff, accepted an order to purchase goods for him at Riga, and put them on board the plaintiff's vessel,—which was sent for them,—as the plaintiff's *891] goods, advised him of the shipment for the plaintiff's *risk and on his account, and remitted him the invoices: he procured the master to sign bills of lading to the order of blank, assuring him it was immaterial: he then drew on the plaintiff, and transmitted the bills of exchange and bill of lading to an agent in this country, with instructions, that, if the plaintiff did not accept the bills of exchange, the agent should endorse over the bill of lading to the payee of the bills of exchange, which was accordingly done: and it was held that the property was changed by the delivery of the goods on board the plaintiff's ship, and that the subsequent endorsement of the bill of lading was inoperative. Here the goods were shipped, upon the account and risk of the plaintiffs, and were made deliverable to them. If I drew my inference from the plea, it would be that which the plaintiffs draw.] The sale being subject to a condition which has never been per-

(a) See the note to *Westzynthius*, in re, 2 Nev. & M. 650.

(b) Q. d. upon a condition precedent.

formed, the plaintiffs never had the right of possession. If the wheat had come into the actual possession of the plaintiffs, the plaintiffs might have maintained trover: *Bishop v. Shillito*, 2 B. & Ald. 329, n. *Whalley v. Montgomery*, 3 East, 585, is the converse of this case.

ABINGER, C. B. We are quite unanimous: and, however reluctant we may be to overturn a considered judgment of the court of Common Pleas, we find ourselves unable to come to any other conclusion than that the plaintiffs are entitled to recover. We accede to the general principle, laid down by the court below; and if the facts had been before a jury, we are not prepared to say that they might not have drawn the inference that the remitting of a banker's draft was a condition precedent to the vesting of the property in the wheat in the plaintiffs. But we draw no such inference from what appears upon the record. The delivery of *the bill of lading and the remitting the banker's draft could not be simultaneous acts: the plaintiffs must have received the bill of lading and invoice before they could send the draft. The default on the part of the plaintiffs amounts to no more than this, that they have omitted to perform one part of their contract. [*892

ALDERSON, B. It is quite consistent with the decision of the court of Common Pleas that the remitting the banker's draft was a condition subsequent.(a)

At the trial damages had been assessed contingently: But this not appearing upon the record,(b) a discussion arose as to whether a writ of inquiry should be awarded. *Clement v. Lewis*, 3 Bro. & B. 297, 7 J. B. Moore, 200, was referred to for the purpose of showing that there must be a *venire de novo*. On the other hand, it was suggested that the only ground on which a *venire de novo* was held in that case to be the proper course was, that otherwise the party would be deprived of his attain, now abolished by the statute 6 G. 4, c. 50, s. 60. ROLFE, B., observed that although that was assigned as one ground, it did not follow that it was the only one.(c)

The court directed a simple judgment of reversal to be entered, leaving it to the court below to award an inquiry of damages.(d)

(a) Vide *Wynne v. Wynne*, ante, Vol. II. p. 8.

(b) There would have been an incongruity in entering an assessment of damages together with a finding which barred the whole action. In *Syde v. The Earl of Rochford*, 2 W. Blac. 1165, where damages were assessed upon the general issue, with a finding for the defendant upon a plea barring the action, the finding upon the latter plea was only contingent on the opinion of the court upon a special case.

(c) *Quære*, what other could have been assigned?

(d) Vide 11 G. 4, & 1 W. 4, c. 70, s. 8.

*893] *BOSTOCK, Executrix of HAWORTH, v. HUME, Administrator of FIELDER. June 15.

By a separation deed dated the 22d of April, 1797, A., the husband, covenanted with C. to pay B., the wife, during her life, into her proper hands, for her separate use, or to such persons as she should by any note in writing signed with her proper hand appoint, notwithstanding coverture, the yearly sum of 163*l.* 16*s.*, by weekly payments of 3*l.* 3*s.* The deed contained a proviso for redemption of the annuity, on payment by A. to his wife, "to and for her separate use," of 1000*l.*, and all arrears of the annuity then due. In November, 1797, A. gave D., with whom B. lived, a bond and warrant of attorney for 1400*l.* and interest, payable in 1799; and in his answer to a bill filed by A. in 1800, to restrain proceedings at law upon those securities, C. admitted, that, as to the 1000*l.*, the consideration was the sum agreed to be paid by A. for the redemption of the annuity; and upon A.'s death the bond and warrant of attorney were found among his papers.

In covenant by E., the administrator of C., against F., the executor of A., to recover *thirty-nine years' arrears of the annuity*, F. pleaded that A. had, under the proviso, paid to B., for her separate use, 1000*l.* and all arrears. At the trial, the judge told the jury that the absence of any payment or claim for thirty-nine years, though not conclusive, was evidence for their consideration, whether the annuity had been extinguished by payment of the 1000*l.* and arrears, under the proviso; and that, if the bond and warrant of attorney were given to D. by the authority of A., and for her use, for the 1000*l.*, and the money thereby secured was actually paid to D. or to his personal representative, such payment was a payment to B. within the issue:—*Held*, that the direction was correct.

COVENANT. This action was brought in December, 1842, by Hume against Bostock, under an order of the House of Lords, made on the 13th of June preceding, on the hearing of an appeal against a decree pronounced by ALDERSON, B., on the 20th of May, 1842, in a cause of *Haworth v. Bostock*, 4 Y. & C. 1.

Hume, the plaintiff below, declared, as administrator of George Fielder the elder, upon an indenture bearing date the 22d of April, 1797, executed by John Haworth, the testator, whereby he covenanted with Fielder the intestate to pay, during the life of Sarah Haworth, the testator's wife, *into her proper hands*, for her separate use, or to such persons as she should
 *894] by any note *in writing signed with her proper hand, appoint, notwithstanding coverture, the yearly sum of 163*l.* 16*s.*, by weekly payments of three guineas; and averred, that, during the lifetime of the testator, to wit, on the 20th of November, 1831, 4639*l.* 19*s.*, for twenty-eight years and seventeen weeks of the annuity, and, after his death, to wit, on the 19th of November, 1842, 1801*l.* 16*s.*, for eleven years of the annuity, became and were due to Sarah Haworth.

The defendant craved oyer of the indenture, which was a deed of separation of John Haworth and Sarah his wife, containing a proviso:—That, in case John Haworth should, at any time thereafter, pay unto Sarah Haworth, to and for her separate use, 1000*l.*, then, upon payment of all arrears of the said annuity which should then be due, the said annuity should cease and be no longer payable. He then pleaded, (being by the order restrained from setting up a defence under the statute 3 & 4 W. 4, c. 27,) first, that John Haworth, under and by virtue of a proviso, and to redeem the annuity, paid Sarah Haworth, to and for her separate use, an

that she accepted and received 1000*l.*, and that he paid all arrears of the annuity then due; and that thereupon the annuity ceased and became no longer payable: secondly, that Fielder and Sarah Haworth released John Haworth: thirdly, that the indenture was obtained by fraud and covin.

The issues joined upon these pleas were tried before CRESSWELL, J., at the sittings at Westminster after Michaelmas term last.

In support of the first issue, the defendant gave in evidence—a bill in Chancery filed by John Haworth, the testator, against Fielder, the covenantee, and Sarah Haworth, on the 21st of November, 1800—an injunction, issued or dated the 19th of March, 1801, for want of answer,—to stay proceedings at law upon the bond *and warrant of attorney hereinafter mentioned—an answer by Fielder, the covenantee, filed the 30th [*895 of May, 1801 (no answer having been put in by Sarah Haworth)—an order nisi to dissolve the injunction, after answer, made the 31st of July, 1801—a bond to secure 1400*l.* and interest, and a warrant of attorney for that sum, dated the 13th of November, 1797, payable on the 9th of July, 1799, from John Haworth to George Fielder, the younger, with whom Sarah Haworth lived, and whose name she assumed, after the separation

George Fielder, the younger, died in 1799, having made a will, whereof he appointed his father, the covenantee, his executor, by whom the same was proved. The bill of the 21st of November, 1800, was filed for the purpose of restraining Fielder, the elder, as executor of his son, from proceeding at law to enforce payment of the 1400*l.*, secured by the bond and warrant of attorney.

The answer of Fielder, the covenantee, admitted that the consideration for the bond and warrant of attorney was, as to 1000*l.* money agreed to be paid for the redemption of the annuity.

The only evidence of payment of the 1400*l.* was, the finding the bond and warrant of attorney, after the death of John Haworth, the covenantor, amongst his papers.

The learned judge directed the jury that the absence of evidence of any payment of, or claim to, the annuity for thirty-nine years, although not conclusive, was evidence for them to consider, upon the first issue, whether or not the annuity had been extinguished by payment of the sum of 1000*l.* and all arrears of the annuity, according to the proviso contained in the indenture; but that it was for them to say whether or not they thought the sum of 1000*l.* and all arrears of the annuity had been paid either to Sarah Haworth or to some person duly authorized by her to receive the same; and *that, if the bond and warrant of attorney were given to [*896 Fielder, the younger, by the authority of Sarah Haworth, and for her use, for the sum of 1000*l.* mentioned in the annuity deed, and the money thereby secured was actually paid to the obligee named in the bond, or to his personal representative, then such payment was a payment to Sarah Haworth within the meaning of the first issue.

To this direction the counsel for the plaintiff excepted, on the ground

that "Sarah Haworth had not power to give legal effect to the giving such bond, by her concurrence ; and the giving such bond with such concurrence, and the subsequent payment, could not be a redemption of the annuity by the payment of 1000*l.* to the wife to her separate use, as provided for by the deed, and alleged in the first plea."

The jury returned a verdict for the defendant on the first issue ; and the plaintiff having brought a writ of error, the exceptions now came on to be argued in the Exchequer Chamber, before POLLOCK, C. B., PARKE and ALDERSON, Bs., and PATTESON and WIGHTMAN, Js.

Barstow, for the plaintiff. The only evidence to prove that the 1000*l.* mentioned in the first plea had been paid to the wife in discharge of the annuity, was, that the bond and warrant of attorney for 1400*l.* given by the covenantor to Fielder, the younger, in November, 1797, was found amongst the papers of the former after his death. The direction of the learned judge clearly is not warranted in point of law. [PARKE, B. A payment by means of a security given to Fielder, the younger, with the concurrence of the wife, would be the same as if the money had been actually paid to her use.] It was admitted that the bond was not paid off in 1801 ; and arrears of the annuity had accrued between the date of the bond and the subsequent payment. POLLOCK, C. B. Two propositions were laid down *897] at the trial—first, the mere absence of payment or of claim for thirty-nine years, was not conclusive proof of extinguishment of the annuity, but that it was a circumstance from which the jury might infer it ; secondly, that a particular mode of payment was a payment, within the meaning of the issue, irrespectively of the question of concurrence. Here, the payment made is a payment to the wife.] The covenant for payment of the annuity makes payment to any other person than the wife herself good only where that person has authority in writing to receive it. [ALDERSON, B. If that point had been made, the judge would have told the jury that they would be justified, from the lapse of time, in finding that Fielder, the younger, had an authority *in writing*.] A married woman can make no contract at law. The redemption clause requires the payment to be made to *her* only : she could not authorize Fielder to receive it for her. [PARKE, B. According to the ordinary meaning of the words used, the covenant would be satisfied by payment to any person whom she might appoint to receive the money.] The judgment of SHADWELL, V. C., in *Barrymore v. Ellis*, 8 Sim. 1, shows the jealousy with which these provisions are viewed in courts of equity.

W. H. Watson, (with whom was Sir *T. Phillips*,) *contrà*, was stopped by the court.

Per Curiam ; The object of the deed was, to secure the payment to the wife ; which object would be better attained by directing it to be made to a person appointed by her than by her receiving the annuity herself. A payment to a person authorized by Sarah Haworth to receive on her behalf, is a payment to her separate use.

Judgment affirmed.

*The AYLESBURY Railway Company v. MOUNT. Feb. 3. [*898

By a railway act, (a) the company are empowered to sue *subscribers* for calls; and the directors are authorized from time to time to make calls of money from the *subscribers* to and *proprietors* of the undertaking *for the time being*, and "if any owner or proprietor *for the time being* of any such share shall neglect or refuse to pay such his rateable proportion, together with interest, if any, it shall be lawful for the company to recover the same by action of debt, &c., or the directors may declare his shares to be forfeited, and to order them to be sold." And, "that, in any action to be brought by the company against any proprietor *for the time being* of any share, to recover any money due in respect of any call, it shall be sufficient for the company to declare and allege, that the defendant, *being a proprietor* of a share in the undertaking, is indebted to the company in such sum of money as the calls in arrear amount to, for a call, or so many calls, of such sums of money upon a share belonging to the defendant, whereby an action hath accrued to the company by virtue of this act, without setting forth the special matter; and on the trial of such action it shall only be necessary to prove that the defendant, at the time of *making* such respective calls, *was a proprietor* of a share in the undertaking," &c. The act enables proprietors to sell and dispose of their shares subject to certain rules and conditions, and provides, that, "on every sale, the conveyance (being executed by the seller and purchaser) shall be kept by the company, who shall enter in some book a memorial of such transfer and sale, and endorse the entry of such memorial on the deed of sale or transfer;" and that, "until such memorial has been made and entered, the seller shall remain liable for all future calls, and the purchaser shall have no part or share of the profits of the undertaking, nor any interest in respect of such share paid to him, or any vote in respect thereof as a proprietor;" and "that no person or corporation shall sell or transfer any share upon which any call has been made, after the day appointed for payment, unless at the time of such sale or transfer he or they have paid the full sum of money called for in respect of such share."

In an action for a call, the declaration stated that the defendant, before the commencement of the suit, to wit, on the 6th March, 1838, *being the proprietor* of fifty shares in the undertaking, &c., *was indebted* to the company in 250*l.* for a call of 5*l.* upon each share; whereby, and by reason of the said sum of 250*l.* being and remaining wholly unpaid, the defendant *still is indebted* to the plaintiffs in the same, and an action hath accrued, &c.

The defendant pleaded, that although on the 6th March he was the proprietor of the shares, *after the making of the call, and before the same was payable*, he duly transferred all his shares in the undertaking to one Thompson, that Thompson accepted the transfer, and that the conveyance was delivered to, and entered and memorialized by, the company, before the call was payable, whereby the defendant ceased to be the proprietor of the shares, and to be liable to the said call:—

Held,—reversing the judgment of the court of C. P.,—that the declaration was sufficient upon general demurrer; and that the plea was bad, as an argumentative denial of the debt.

DEBT for the amount of a call upon certain shares.

The declaration stated, that the defendant, *before the commencement of this suit*, to wit, on the 6th March, *1838, *being the proprietor* of fifty shares in a certain undertaking, &c., *was*, and the defendant [*899 before and at the time of the commencement of this suit *was and still was indebted* to the company in 250*l.*, for a call of 5*l.* upon each of the said shares, &c.; whereby, and by reason of the said sum of 250*l.* being and remaining wholly unpaid, the defendant *still was indebted* to the plaintiffs in the same, and an action hath accrued, &c.

Plea—that true it was that before the commencement of the suit, the defendant was the proprietor of the shares in the declaration mentioned; that the call in the declaration mentioned was made under and pursuant to the provisions of the said act, for an instalment of 5*l.* per share, to be paid by

the proprietors *on or before the 9th April then next*; but that afterwards, and before the said 9th of April, to wit, *on the 7th April, 1838*, the defendant, being such proprietor as aforesaid, sold all his shares in the undertaking (the said shares being the same shares in respect of which the plaintiffs claimed that the said call) to one Charles Thompson, and that Thompson then took and accepted the same; the defendant then, to wit, on the said 7th April, 1838, *after the said call was made, and before the same was due or payable*, by a deed under the seal of the defendant, and also under the seal of Thompson (which deed being then in the possession of the plaintiffs, the defendant was therefore unable to bring into court,) in consideration of 5*l.* paid to the defendant by Thompson, *did assign and transfer to Thompson* *900] *son the said shares in the declaration *mentioned*, to hold to Thompson, his executors, administrators, and assigns, *subject to the several conditions on which the defendant held the same immediately before the execution thereof*; and that Thompson thereby then agreed to accept the said shares subject to the conditions aforesaid—*prout patet, &c.*: that the said deed was duly stamped before the same was executed by either party, and was made and executed according to the provisions of the act: that the defendant and Thompson then duly delivered the said conveyance (the same then and before the said call was payable, being first duly executed by both the defendant and Thompson) to the company, to be kept by the company according to the provisions of the act; and then requested the company to enter in the said company's book kept for that purpose, a memorial of the said transfer and sale, and to endorse the entry of the memorial on the said conveyance or transfer; *which memorial and endorsement the said company then, and before the said call was payable, made according to the act*; and thereupon, and before the call became due and payable, to wit, on the 7th of April, the company duly received the said conveyance, and then duly entered the memorial in the company's book, and then duly endorsed the entry of the memorial on the said conveyance, according to the act, and then accepted the said transfer of shares; whereby the defendant then and before the said call became payable, ceased to be the proprietor of the said shares, and ceased to be liable to the said call under the provisions of the act. Verification.

The court of Common Pleas (a) held that the declaration, not alleging that the defendant, "being a proprietor, is indebted," &c., disclosed no cause of action: but that, assuming that it did disclose a sufficient cause *901] *of action, it was well answered by the plea, which was good in substance, because it showed that the defendant had transferred his shares and entered a memorial of the transfer before the call was payable, and was therefore not liable, and good in form, because it admitted all the matters of fact stated in the declaration, (viz., that the defendant *was* a proprietor, that a call was made, and that it remained unpaid,) and that, by introducing affirmative matter not inconsistent with those facts, showed that,

(a) On special demurrer to the plea.

notwithstanding those facts, the defendant was not liable: and that the plea properly concluded with a verification, as it confessed and avoided the matters stated in the declaration.(a)

Upon this judgment the plaintiffs brought a writ of error. The errors assigned were argued before Lord ABINGER, C. B., PARKE, B., PATTERSON, J., ALDERSON, B., COLERIDGE, J., ROLFE, B., and WIGHTMAN, J.

Bovill, for the plaintiffs in error, re-urged the arguments used in the court below, and submitted that the declaration was sufficient *upon general demurrer*; and that the plea was clearly bad as amounting to never indebted; *The Edinburgh and Leith Railway Company v. Hebblewhite*, 6 M. & W. 707, 8 Dowl. P. C. 802, 2 Railw. Cas. 237.

Biggs Andrews, contra. The declaration is bad, for not alleging, according to the form given by the ninety-eighth section of the act, that the defendant, being a proprietor of shares, *is* indebted. He also relied upon the judgment of the court below, as showing that the plea was good, and cited *Carr v. Hinchliff*, 4 B. & C. 547, 7 D. & R. 42.

*Lord ABINGER, C. B. Though not in literal conformity with the ninety-eighth section, I think the declaration is sufficient. It states that the defendant *was* a proprietor, and that he *is* indebted; that is clearly sufficient upon general demurrer. [*902]

The plea is, substantially, a denial that the defendant ever was indebted: it is an argumentative general issue.

PARKE, B. According to the true meaning of the ninety-eighth section, the declaration is clearly sufficient. The plea is bad, as being a mere argumentative denial that the defendant ever was indebted to the company.(b)

The rest of the court concurring,

Judgment reversed.

(a) Vide 5 Scott, N. R. 127, 2 Dowl. N. S. 143, 2 Railw. Cas. 679.

(b) Vide *Michel v. Wallington*, M. 21 H. 6, fo. 2, pl. 2.

MEMORANDA.

IN the course of the last vacation, the Right Hon. *Thomas Erskine* resigned his seat as one of the judges of this court, to which he had been appointed on the 9th of January, 1839.

On the sixth day of this term, *William Erle*, Esq., of the Inner Temple, one of her majesty's counsel, was called to the degree of the coif, and gave rings with the motto, "*tenax justitiæ*." On the following day he took the oaths and his seat as one of the judges of this court, in the room of Mr. Justice *Erskine*. He afterwards received the honour of knighthood.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
IN
Michaelmas Term,
IN THE EIGHTH YEAR OF THE REIGN OF VICTORIA.

The judges who usually sat in banco during this term were,

TINDAL, C. J.
 COLTMAN, J.

MAULE, J.
 CRESSWELL, J.

CAUNCE v. SPANTON. Nov. 6.

In trover, a demand and a refusal on the ground of a claim of right by a third party, is evidence of a conversion.

TROVER, for a cart. Plea, not guilty, under which it had been agreed, under a judge's order, that the defence of lien might be set up. A summons had been taken out by the defendant to add a plea of "not possessed,"^(a) which summons had been *dismissed by an order of *904] **TINDAL, C. J.**, upon the terms above stated.^(b)

At the trial before **CRESSWELL, J.**, at the sittings for London, after last term, the evidence of the conversion was, that the plaintiff demanded the cart of the defendant, (upon whose premises it had been standing,) and at the same time offered to pay whatever might be due for the standing; but that the defendant refused to deliver it up, upon the ground that one Bartlett was a part-owner of it,^(c) and that he had given the defendant an in-

(a) Supposing "not possessed" had been pleaded, *quære*, whether, upon proof of a joint possession in the plaintiff and Bartlett, the defendant would not have been entitled to a verdict, on the ground that an allegation of seisin or of possession, generally, must be taken to import an assertion of sole seisin or sole possession. See *Edwards v. The Bishop of Exeter*, 5 New Cases, 660; *anté*, 173, n.

(b) See *White v. Teal*, 12 A. & E. 106.

(c) The refusal being accompanied by a statement of the ground of that refusal, *quære*, whether the allegation of part-ownership would not have been evidence under a plea of "not possessed," to negative the sole possession: vide *suprà*, 903 (a).

demnity. The learned judge ruled that this was sufficient evidence of a conversion; and the plaintiff obtained a verdict, damages 16*l*.

Byles, Serjt., now moved for a new trial, upon the ground of misdirection. He submitted that demand and refusal is not evidence of a conversion where the party has a lien upon the chattel; *Stancliffe v. Hardwick*, 2 C., M. & R. 1, 5 Tyrwh. 551, 3 Dowl. P. C. 762. [MAULE, J. Here, the ground of refusal is a claim of right on the part of Bartlett.]

Per curiam;

Rule refused.(a)

(a) And see *Boardman v. Sill*, 1 Campb. 410, n; *Thompson v. Trail*, 2 Carr. & P. 334, and 6 B. & C. 36; *Thompson v. Small*, 1 C. B. 328.

***RASTRICH v. BECKWITH, DYE, and KITTON. Nov. 13. [*905**

The rule, that a privileged person loses his privilege if sued with an unprivileged person, is not affected by the 2 W. 4, c. 39.

A. and B., both being attorneys of B. R., being also an attorney of C. P., were sued in the latter court.

Held, that A. could not insist upon his privilege of being sued in B. R.

ASSUMPSIT, for work, labour, materials, journeys, and attendances; for money paid; and for money due upon an account stated.

Plea, by the defendant, George Arthur Dye: that, before and at the time of the commencement of the suit, each of the three defendants was, and from thence continually had been and still was, one of the attorneys of the court of our lady the queen, before the queen herself, and had prosecuted and defended, and still did prosecute and defend, divers suits and pleas in the said court, &c., for divers liege subjects of our said lady the queen, as their attorney; and that he, Dye, and all other the attorneys of the last-mentioned court, prosecuting and defending suits and pleas for their clients in that court, ought, by an ancient and laudable custom, from time immemorial used and approved of, according to the laws and customs of this realm, and the liberties and privileges of the last-mentioned court, to be free and exempt from being compelled against their will, and had not, nor had any of them, at any time or times whatsoever theretofore, been used or accustomed to be compelled to answer any plea or plaint in any action personal, (pleas of freehold, felony, and appeals only excepted,) before any justice or minister of our said lady the queen, or other judge whatsoever, in any court whatsoever, except before the justices of our said lady the queen, before the queen herself:—Verification, and prayer of judgment if the said court of our lady the queen of the Bench will, or ought to take cognisance of the said plea.

Replication—that, notwithstanding any thing by the defendant Dye in his said plea above alleged, the court *of our said lady the queen of the Bench, before her majesty's justices of the Bench here, ought to take, and will take cognisance of the plea aforesaid, because the defend- [*906

ant Kitton, before and at the time of the commencement of the suit, was, and still is, one of the attorneys of the same court, admitted to prosecute and defend suits and pleas in the same court, for the subjects of our said lady the queen, as their attorney:—Verification.

Rejoinder—that the defendant Dye ought not to be compelled to answer to the plaintiff in the said court here; because, before, and at the time of, the commencement of the suit, the defendant Kitton was, and from thenceforward had been, and still was, one of the attorneys of the court of our lady the queen before the queen herself, and had prosecuted and defended, and still did prosecute and defend, divers suits and other pleas in the said court, &c., for divers liege subjects of our said lady the queen as their attorney:—Verification.

Special demurrer, assigning for causes, that the defendant Dye, in or by his said rejoinder, had not traversed or denied the fact, stated in the replication, of the defendant Kitton being an attorney of the court of the Bench here; nor had he, in any manner, confessed and avoided the same fact; that the fact of Kitton being an attorney of the court of our lady the queen, before the queen herself, was immaterial and led to an immaterial issue, and was a repetition only of a statement already contained in the plea, and was sufficiently confessed and avoided by the replication thereto; that the defendant Dye, in and by his said rejoinder, admitted that Kitton was and is an attorney of the court of our lady the queen of the Bench here, and that Kitton, being an attorney of that court, although an attorney of the court of our lady the queen, before the queen herself, likewise, was not, nor is, *907] privileged to be sued in the last-mentioned court only, and therefore the defendant Dye, being sued in this action jointly with a person not privileged, was himself not privileged to be sued in such court; that the defendant, Dye, being sued in this action jointly with others, could not avail himself of any privilege not claimed by his co-defendants; that it did not appear by the rejoinder that either Kitton or the other defendant, Beckwith, was entitled to, or claimed, the privilege of being sued, in respect of the causes of action in the declaration mentioned, in the said court of our lady the queen before the queen herself, &c.

Talfourd, Serjt., in support of the demurrer. The simple question in this case is, whether an attorney is entitled to the privilege of being sued in that court of which he is an attorney, when a co-defendant with another attorney who may properly be sued in the court where the action is brought: and it is submitted that he has no such right. [ERLE, J. It seems to be the case of an unprivileged person.] This action, being *ex contractu*, must be brought against all three defendants; and one of them, the defendant Kitton, is an attorney of this court, and may clearly be sued here. The rule is, that where an attorney is sued in right of another,—as executor, for example,—or is sued with his wife for a debt due from her *dum sola*, or with an unprivileged person, he loses his privilege; Bac. Abr. tit. *Privilege*, (B.) 3, citing *Pratt v. Salt*, H. 8 G. 2, B. R.; *Roberts v. Mason*, 1 Taunt.

254; in which latter case HEATH, J., said, "An attorney, if sued with another, loses his privilege: otherwise there must be two actions instead of one." (a) [TINDAL, C. J. That precise reason would not apply here; for there would be no necessity to bring an action in two courts, as the three defendants are all of them attorneys of the *Queen's Bench.] The plaintiff is not bound to find out whether there is any court in which they could all be sued, having a right to sue Kitton in this court. In *Newton v. Harland*, 4 N. C. 406, 6 Scott, 186, 6 Dowl. P. C. 630, which was an action by a barrister and his wife for an assault upon the latter, this court held that the plaintiff could not, by virtue of his privilege as barrister, restore the venue to another county, it having been changed by the defendant. The principle is further illustrated in 2 Roll. Abr. *Privilege* (F.) 4, 17 Vin. Abr. 518, and in *Branthwait v. Blackerby*, 2 Salk. 544. (b) The 7 W. 4, & 1 Vict. c. 56, s. 4, by which attorneys admitted of one court, may practise, and recover costs for business transacted, in another, probably makes no difference in the case.

Channell, Serjt., contra. The old law was undoubtedly as stated on the other side, for the reason given by HEATH, J., in *Roberts v. Mason*. An attorney formerly must have been sued by bill, and another party by original; and therefore if the attorney could have claimed his privilege where he was sued with an unprivileged party it would have rendered two writs or processes, of a different nature, necessary. *Ramsbottom v. Harcourt*, 4 M. & S. 585, shows the reason of the rule more clearly. It was there held that an attorney sued *by bill* jointly with a member of parliament, did not lose his privilege, because both defendants might be sued by bill. But now that the proceeding by bill is taken away by the uniformity of process act, 2 W. 4, c. 39, the reason no longer exists for disallowing an attorney his privilege when a co-defendant with an unprivileged person, though the attorney's privilege to be sued in his own court is not abolished; *Pitt v. Pocock*, 2 C. & M. 146, 4 Tyrwh. 85; (c) *Lewis v. Kerr*, 2 M. & W. 226; *Prior v. *Smith*, 6 Dowl. P. C. 299. In the last-mentioned case [909] PATTESON, J., in reference to the 7 W. 4, & 1 Vict. c. 56, s. 4, said, "The words of the statute show that he (the attorney) may come here voluntarily; he cannot be compelled to come here." And in giving judgment his lordship added, "The act of parliament, by itself, does not render an attorney liable to the process of another court, so as to destroy his privilege." It is clear that all the defendants might have been sued in the Queen's Bench, as Kitton is an attorney of that court. The allegation in the plea, that the two defendants, Beckwith and Kitton, are attorneys of the Queen's Bench, may perhaps be rejected as surplusage. (The learned serjeant also referred to *Serjt. Scrogg's* case, Bac. Abr. tit. *Privilege*, (B) 2. (d))

Talfourd, Serjt., in reply. There is no reason why the old rule should

(a) 1 Taunt. 256.

(b) 8. C. per nom. *Broadwaite v. Blackerby*, 12 Mod. 163.

(c) 8. C. (per nom. *Keep v. Figgs and Pocock*.) 2 Dowl. P. C. 278.

(d) And see 8. C. 2 Lev 129, 2 Mod. 296.

not still prevail. If the case were, that two of the three defendants were attorneys of the Queen's Bench, and the third an attorney of the Common Pleas, upon the argument on the other side, the plaintiff could not sue them at all. [TINDAL, C. J. Suppose the action had been brought in the Queen's Bench, could Kitton have pleaded his privilege to be sued in this court?] Clearly not. [MAULE, J. If a party is an attorney in two courts, the plaintiff may elect in which he will sue him.] That has been done here. The uniformity of process act has no application. [TINDAL, C. J. It gets rid of the difficulty as to the different form of the process.] But here the question is, as to the privilege of being sued in a particular court only, not as to the form of the process.

TINDAL, C. J. In this case it is clear that the defendant Kitton, being
 *910] an attorney of this court, has no *privilege to remove the suit into the court of Queen's Bench. If he cannot do so, it would be a singular state of things that the defendant Dye should be able so to remove it. As against Kitton the action is properly brought in this court. And it appears to me the difficulty is unanswerable—that if the defendant Dye might now remove the suit into the Queen's Bench, because he is an attorney of that court, when the cause got there Kitton might bring it back to this court, upon the ground that he is an attorney here.^(a) I think we must stand upon the old rule, that when a privileged person is sued with an unprivileged person, the privilege of the former is lost; and hold that this rule is not affected by the 2 W. 4, c. 39, or the cases cited by my brother Channell.

COLTMAN, J. If the defendant Kitton were not an attorney of the Queen's Bench, there would be no difficulty in the case. But the fact of Kitton's being an officer of that court will not prevent his being sued here. Otherwise, it would impose upon the plaintiff the difficulty of ascertaining in what court all the parties were attorneys. I think the case falls within the ancient rule.

MAULE, J. I am of the same opinion. The argument that appears chiefly to be relied upon on behalf of the defendant is, that the uniformity of process act has taken away the reason of the former rule, and therefore that the privilege remains. Now, that may be true as regards that particular privilege where a different process would issue in the two cases; but here
 *911] *his privilege of being sued in a different court is quite independent of that other privilege, and the rule still applies to it.

ERLE, J. It appears to me that the rule—which I take to be, that a privileged person sued with an unprivileged person loses his privileges—is not altered by the operation of the uniformity of process act. That act relates only to the *mode* of proceeding. But the privilege of being sued in his own court is of a distinct character; and the old rule equally applies to that pri-

(a) This difficulty would arise where one defendant was an attorney of one court only, and his co-defendant an attorney of another court only; though not in this particular case, Kitton being an attorney of both courts.

vilege. Otherwise, if an action were brought against two attorneys, one an attorney of the court of Queen's Bench and the other an attorney of the court of Common Pleas, each might suspend the action at pleasure.(a) I think the defence fails. Judgment of *respondent ouster*.(b)

(a) This would not be altogether unlike the old practice in this court, of *fourcher par essoin* or *viciisim essoniare*. Vide statute Westminster, 2, c. 43; Brooke's Abridgment, tit. *Fourcher et fourching*; 2 inst. 250; Booth on Real Actions, 16.

(b) And see *Laundier v. Cokayn*, Barnes, 44; *Richards v. Setree*, 3 Price, 197.

***SARAH ASPINALL and ELKANAH ASPINALL v. JAMES [912
AUDUS and Others. Nov. 8.**

A will contained the following clauses:—"I give, devise and bequeath the whole of my property, real and personal, whatsoever and wheresoever, to my daughter E., to her heirs and assigns for ever; provided she, at a proper time, intermarries and should have no children; then and in that case I give the whole of my property, as aforesaid described, to my nephew L., except 100*l.* to my godson B., son of my brother J., when he shall attain his twenty-first year; and in case he should die before he attains the age of twenty-one, I give the same sum of 100*l.* to my brother J., to him, his heirs and assigns for ever; but nevertheless, providing my daughter E. should not have child or children lawfully begotten in wedlock, I still give all my real and personal property to her and for her own use during her natural life, and at her death to be equally divided amongst her children then living, share and share alike, to them, their heirs and assigns for ever; and in case of the deaths of any of my daughter's children before they attain the age of twenty-one, in that case I devise and give to the survivor or survivors, equal share or shares of such sum or sums as may be, to be divided equal amongst them, their heirs and assigns for ever; and should it so happen that all my daughter's children should die except one, then the whole of my bequests to be given that child, he or she attaining twenty-one years of age; and should that one child die without issue, then I give and bequeath all my real and personal estate, whatsoever or wheresoever as aforesaid, to my nephew L. and my godson B., to them, their heirs and assigns for ever, after the death of my daughter E."

E. survived the testator, and died unmarried:

Held, that she became entitled to the fee-simple in the real estate, and to the absolute interest in the leasehold estate.

THE following case was sent to the judges of this court, pursuant to an order of Sir James Wigram, V. C., of the 24th November, 1843.

Elkanah Aspinall, the testator in the pleadings named, was, at the time of making his will, and thenceforward until the time of his decease, seised of the inheritance in fee-simple in certain freehold messuages in the county of York, and at the time of his decease was also possessed of leasehold estates in that county, and other personal property; and being so seised and possessed, the said Elkanah Aspinall duly made and published his last will and testament in writing, bearing date the 24th day of March, 1817, and which will was duly executed *by him in the manner then required [913 for rendering valid devises of freehold estates; and such will was in the words and figures following; that is to say,

"In the name of God, Amen, I Elkanah Aspinall, of the township of Barlby and parish of Hernborough in the county of York, stone-merchant, in perfect health of body, and of sound mind, memory, and judgment, do publish and declare this to be my last will and testament, revoking all other former will or wills heretofore made: I give, devise, and bequeath all my

real and personal estates whatsoever and wheresoever within the three united kingdoms called Great Britain, or whatever may, in my lifetime or after my death, fall to me by law as my right or by the right of my beloved wife Elizabeth Aspinall, in manner as follows; viz., 1st, I give unto my said wife Elizabeth, during her natural life, or until her marriage, which shall first happen (*sic*) all my messuages, houses and tenement, hereditaments, &c., upon which I now live, called Barlby Bank, in the township, parish, and county aforesaid in the East Riding of the county of York; also, 2dly, I give unto my said wife Elizabeth all my personal estate and effects, including my stock in trade, book-debts, and all other property of what nature or kind, whatsoever or wheresoever, to my said wife Elizabeth during her natural life or marriage, which shall first happen; (*sic*) should I be in possession of any ships, sloops, or vessels, part or parts, at the time of my death, then I do direct that, as soon as convenient, my executors hereinunder-mentioned will sell such part or parts of ships or vessels as I may be entitled to at the time of my death, with my stock of stone I may then have, together with my book-debts and other moneys collect up, with the sale of my furniture my said executors may think proper to dispose of, and to sell and make all as above into lawful money or cash of the realm, *914] and then I do direct that my said executors will *place the said moneys or cash out upon real or government securities, the interest arising from the said moneys to be regularly and from time to time paid to my said wife Elizabeth by my executors during the time of her natural life, or so long as she remaineth my widow, and no longer; after her death or marriage, which shall first happen, I give, devise, and bequeath the whole of my property real and personal, whatsoever or wheresoever, of what kind or description soever within the three united kingdoms of Great Britain, unto my dear and dutiful daughter Eliza Aspinall, to her, her heirs and assigns for ever, provided she, at a proper time, intermarries and should have no children, then and in that case I give the whole of my property as aforesaid described, to my nephew Luke Aspinall, oldest son of my brother John Aspinall, except 100*l.* to my godson Bethel Aspinall, son of my brother Job Aspinall of Halifax, when he shall attain his twenty-first year; and in case he should die before he attains the age of twenty-one, I give the said sum of 100*l.* to my brother Job Aspinall of Halifax, to him, his heirs and assigns for ever; but nevertheless providing my daughter Eliza should not have child or children lawfully begotten in wedlock, I still give all my real and personal property what or wherever, to her and for her own use during her natural life, and at her death to be equally divided amongst her my daughter's children then living, share and share alike, to them, their heirs and assigns for ever; and in case of the death of any of my daughter's children before they attain the age of twenty-one, in that case I devise and give to the survivor or survivors equal share or shares of such sum or sums as may be to be divided equal amongst them, their heirs and assigns for ever; and should it so happen that all my daughter's children should die,

except one, then the whole of my bequests to be given that child, he or she attaining the twenty-one years of age; and *that one child should die without issue, then I give and bequeath all my real and personal [*915 estates whatsoever or wheresoever as aforesaid, to my nephew Luke Aspinall and my godson Bethel Aspinall, to them, their heirs and assigns for ever, after the death of my daughter Eliza; but should I not leave in all, I may have a right too, at the time of my decease, sufficient for a maintenance for my said daughter from the interest to keep or support her, I give, in that case, to my dear daughter 100*l.* to her my said daughter Eliza's own use, and no more; I therefore do nominate and appoint James Audus, gentleman, in the Crescent of the town of Selby, in the West Riding of the county of York, together with my dear daughter Eliza Aspinall, as joint executors of this my last will and testament, that after paying all my just debts, funeral, and testamentary expenses, together with proving this my last will and testament, they my joint executors will apply the property all herein to my bequests as aforesaid. As witness hereunto I subscribe interchangeably my hand and seal, my hand to the first sheet at the foot of the sheet, my hand and seal to this second sheet, this twenty-fourth day of March, in the year of our Lord One thousand eight hundred and seventeen.

“ ELKANAH ASPINALL, L. S.

“ Signed, sealed, published, and declared by the above-named Elkanah Aspinall, as and for my last will and testament; in the presence of us, who, at his request, and in his presence, and in the presence of each other, have subscribed our names as witnesses thereto.

“ SAM. STANILAND.

“ JOHN CLOUGH.

“ SOLN. PITCHFORTH.”

The said Elkanah Aspinall died in the year 1820, without in any manner altering or revoking the said *will, leaving the said Elizabeth Aspinall, his widow, and the said Eliza Aspinall, his only child and [*916 heir-at-law and sole next of kin, and the said Luke Aspinall, John Aspinall, Bethel Aspinall, and James Audus, all in his will named, him surviving; and the said James Audus alone proved the will of the testator; and he assented to the bequest of the said leasehold estate.

Eliza Aspinall, the only daughter of the testator, died in January, 1824, at the age of twenty years and upwards, intestate and without having been married, and left John Aspinall, her uncle, since deceased, her heir at law, and also the heir at law of the said Elkanah Aspinall. Administration to the estate of Eliza Aspinall has since been granted to the defendant James Audus, who is now the personal representative of the said Eliza Aspinall.

John Aspinall died in April, 1830, having duly made his last will and testament, dated the 20th July, 1829, whereby he gave and devised all his real and personal estate unto his wife Elizabeth Aspinall, John Brooke, and William Latham, (all defendants in the cause,) upon certain trusts, for the benefit of his wife, children, and grandchildren.

Luke Aspinall, the nephew of the testator Elkanah Aspinall, in his will mentioned, died in March, 1829, having duly made and published his last will and testament, bearing date the 13th of February, 1827, whereby he gave and devised all his real and personal estate whatsoever unto his wife Sarah Aspinall, his brother Charles Aspinall, and his brother-in-law Joseph Womersley, (all parties to the suit,) upon certain trusts for the benefit of his wife and children.

Elizabeth Aspinall, the widow of the testator Elkanah Aspinall, died in October, 1838.

Bethel Aspinall, the testator's godson, is still living, and is a party to this suit.

*917] *In December, 1839, a suit was instituted in the court of Chancery by the devisees under the will of Luke Aspinall, against the personal representatives of the testator, Elkanah Aspinall, and against Bethel Aspinall, and the persons claiming under the will of John Aspinall, to administer the estate of the said Elkanah Aspinall, and to decide the rights of the parties claiming under the said will, and under the several deceased parties therein mentioned; and on the 24th of November, 1843, the said cause came on to be heard for further directions before Sir JAMES WIGRAM, V. C.; whereupon his honour was pleased to order that a case should be stated for the opinion of her majesty's court of Common Pleas, and that the questions upon such case should be—

1st. What interest, in the events which have happened, Eliza Aspinall became entitled to in the real estate of the testator Elkanah Aspinall under his will, or as his heir at law; and what interest she became entitled to in the leasehold estate of the said testator.

2d. What interest, in the events which have happened, Luke Aspinall and Bethel Aspinall respectively became entitled to in such real estate, and also in such leasehold estate under the will of the said testator.

The case was argued before TINDAL, C. J., COLTMAN, MAULE, and ERLE, Js.

Sir T. Wilde, Serjt., (with whom was Malins,) for the plaintiffs, (the claimants under Luke Aspinall, the nephew of the testator.) The testator's daughter having died unmarried and without issue, his nephew Luke took the whole of the testator's real and personal property, under the will. By the express terms of the clause in the first part of the will, the property was to go over to him, in case the daughter married and had no children; and in the clause in the second part, it was to go over in case her children *918] should die before twenty-one, or the survivor should die without issue. [TINDAL, C. J. The clauses would seem to be contradictory. She could not have children which the law could recognise, without intermarrying.] The will, it is to be observed, is that of an illiterate party; but the effect of the two clauses taken together is, that the estate was to go over if she died unmarried, and consequently without children; that is, she was only to take a life-estate. If she had married, in no case was her hus-

and to take any interest. After providing for his daughter and her issue, the object of the testator's bounty was, obviously, his nephew Luke. In the first part, the testator had not stated, in express terms, what estate his daughter was to take; he says, in case of her intermarriage and having no children, the estate is to go to his nephew, with the exception of 100*l.*; the testator then goes on to say, that in another event, she is *still* to have a life-estate; and that if she has children at her death, the property is to be divided among them; that must mean her legitimate children, who were not previously provided for. The court will not presume that the testator meant to provide for an indefinite number of illegitimate children of his daughter, then an infant of the age of thirteen.^(a) If a reasonable construction can be discovered, it is not to be rejected because there may be some difficulty in the case. Words may be transposed in order to give effect to the reasonable intention of the testator; *Boon v. Cornforth*, 2 Ves. sen. 277. The defendants must contend that the daughter's interest was to go over if she married and had no children, but not if she remained single. The testator was, obviously, not averse to his daughter's marrying. [MAULE, J. Do you contend that the word "not" is to be rejected in the sentence "providing my daughter Eliza should *not* have child or children lawfully begotten in wedlock?"] *Not necessarily; though it [*919 would be more reasonable to reject it than to suppose the testator meant to provide for her illegitimate children. But the word need not be rejected. The meaning would then be this—the testator, recollecting that he had not distinctly said what estate his daughter was to take, explains that she was to have a life-estate only, in case she had no lawful issue; and he then goes on to provide for such lawful issue in case she had any. The will bears this construction without omitting or inserting any words. [MAULE, J. If the daughter took an estate in fee, your claim is at an end. It is clear that an estate in fee is given her in the first part; what is there afterwards to take it out of her?] The latter part must be read in connection with the former; and the whole together shows she was to have only a life-estate. Two events are spoken of with reference to the estate going over to Luke. If she has legitimate children, it is not to go over to him in the first instance; if none, it is to go over. She dies without children, either legitimate or illegitimate; the estate, therefore, goes over. If the testator had intended that his daughter should take the whole estate in case she did not marry, such a circumstance would have pressed upon his mind, and he would have explained himself more clearly. What reason could there be why the testator should wish the estate to go over in the event of his daughter's marrying?

Assuming that the daughter took only a life-estate, then the question is what interest Luke, the nephew, took,—as between him and Bethel, the godson. From the first part of the will it is clear that the whole of the

(a) The case states (*supra*, 916) that the will was made in 1817, and that Eliza Aspinall died in 1824, aged 20 years and upwards.

property goes to Luke, with the exception of 100*l.* to Bethel. That expressly and precisely defines the portion of interest which each is to take. In the second part, the testator gives and bequeaths all his estates "as afore-
 *920] said" to his nephew and his godson: that is, not as *joint-tenants, but according to the previous distribution. The court will not infer a change of intention on the part of the testator in the course of a few lines; his object, throughout, is more clearly to explain his intention, not to alter it. The intention is to be gathered from the whole will; *Hillersdon v. Lowe*, 2 Hare, 355; *Ellicombe v. Gompertz*, 3 Myl. & Cr. 127; *Vaughan v. Breck*, 1 Turn. & Phil. 75.

Talfourd, Serjt., (with whom was *J. Humphrey*,) for the devisees of John Aspinall. The learned serjeant stated, that their interest would require that he should contend that the testator's daughter took an estate in fee; but that he was content that the argument on behalf of the claimants under Luke Aspinall, the nephew, should prevail, so that Bethel, the godson, did not take the whole. As authorities to show that the court would not give effect to a devise to illegitimate children not *in esse*, he cited *Blodwell v. Edwards*, Cro. El. 509, and *Metham v. The Duke of Devon*, 1 P. Wms. 529.(a)

Channell, Serjt., (with whom was *W. Rogers*,) for Bethel Aspinall, (the godson of the testator.) The testator's daughter having died unmarried and without issue, Luke the nephew, and Bethel the godson, (who is also a nephew of the testator,) took the whole property as joint-tenants; and, the former being dead, the latter is entitled to the entirety. The argument on his behalf is the same as that on behalf of the claimants under Luke Aspinall, as to the daughter taking only a life-estate; but it is submitted that upon her death, it would not go over, according to the language of the first clause in the will: that is, the whole to Luke, except 100*l.* to Bethel, but
 *921] according to the second; that is the whole *to Luke and Bethel, their heirs and assigns. The testator intended to give a life-interest to his wife, and then to his daughter; and then, in the event of the latter marrying and having no issue, there is a devise over of the whole to Luke in fee, except 100*l.* to Bethel. That clause is to be read thus, "in that case I give the whole of my property, as aforesaid described, to my nephew Luke Aspinall, eldest son of my brother John Aspinall, to him, his heirs and assigns, for ever;" the remaining part of this sentence, containing the exception as to 100*l.*, being to be read as a parenthesis. The disposition of the property is entirely dependent upon the event of the daughter's marriage. Then, the second clause gives the daughter a life-estate; and provides that if she has several children they are to share alike, and if only one shall survive and shall die without issue, then, there is a devise over of the whole to Luke and Bethel, as joint-tenants. It may be said that this devise could only take effect on the birth of children, and that such condition has not been performed; but the true construction is, that in the first clause, the

marriage of the daughter is a condition; but in the second, the devise to the children is a preceding limitation, and is *not* a condition. In *Fearne on Contingent Remainders*, pages 508, 509, 9th ed., it is said, "Where a devise is upon a condition annexed to a preceding estate, that is, where it is made after a preceding executory or contingent limitation, or is limited to take effect on a condition annexed to any preceding estate, if that preceding limitation or contingent estate never should arise or take effect, the remainder over will, nevertheless, take place; the first estate being considered only as a preceding limitation, and not as a preceding condition to give effect to the subsequent limitation." And again, page 237, "As an instance of that class where subsequent estates were limited on a conditional determination of a preceding estate, and such preceding estate never took effect [*922] *at all, we may refer to the case (a) of a devise to trustees for eleven years, remainder to the first and other sons of B. successively in tail-male, provided they should take the testator's surname; and in case they or their heirs should refuse to take the testator's surname, or die without issue, remainder to the first son of C., remainder over. B. died without having had any son; C. had a son at the time of the devise. The court did not agree as to the validity of the devise to the first son of B.—being after a term of years without any preceding freehold to support it; but resolved, that the subsequent limitation to the first son of C., who was then *in esse* and capable, took effect; and that the preceding limitation to the first son of B., or the condition thereto annexed, did not operate as a precedent condition, which must happen, to give effect to the subsequent limitation to the son of C., but was only a precedent estate attended with such limitation." The marriage therefore being a condition of the first devise to Luke, and such condition not having been performed, that devise does not take effect; but the second, as to which there is no condition, does.

If it is not so, then the second devise is inconsistent with the first, in which case the second must prevail. (b) There is a difference in the period at which the devolution of estate would take place in the two cases. Under the first devise it would take effect on the death of the testator's daughter unmarried. Under the second, twenty years might run before it [*923] could take effect, as that devise is not to come into operation till the death of the surviving child at the age of twenty-one. It has been attempted to reconcile the two devises; but in order to do that, the words "to them, their heirs and assigns for ever," must be struck out of the second devise. It is also said that the latter is substantially a repetition of

(a) *Scatterwood v. Edge*, 1 Salk. 229, 12 Mod. 278, 1 Eq. Cas. Ab. 189.

(b) The statute of wills (32 H. 8, c. 1) requiring no signature or other formal recognition of a will, each clause operated from the moment it was written, and when it was the *last* will of the testator. It was therefore commonly said that "where there are contrarieties in the several parts of a deed or a fine, the *first* part shall stand; and the *last* in wills, if they be not reconcilable." Jenk. Cent. 96. The maxim has been continued after the foundation has failed; the signature required by the statute of frauds and the 7 W. 4, and 1 Vict. c. 26, adopting and authenticating the several preceding clauses as one continuous whole, as fully as the sealing and delivery of a deed.

the former; but in the former, the words are "*his heirs*," (meaning the heirs of Luke alone,) in the latter, "*their heirs*" (meaning the heirs of Luke and Bethel.) The words "as aforesaid" in the latter clause refer to the property, and mean "as aforesaid described." It may be asked why, in the event of the marriage of the daughter and failure of issue, should Luke take all but 100*l.*, and in the event of their being children, (either with or without marriage,) and of their not attaining the age of twenty-one, Bethel should take as joint-tenant with Luke: but the postponement of the period when the two nephews would take in the latter event, might be a reason for the difference. The marriage of the daughter is not necessary in order that the second devise should take effect.

Byles, Serjt., for the defendant (James Audus, the executor of the will of Elkanah Aspinall, and the administrator to the effects of Eliza Aspinall, his daughter.)

The testator's leasehold property vested absolutely in the daughter at once; there is nothing to cut that down.

As to the freehold property, the first devise is an executory limitation to the daughter, who was the testator's heir at law: the estate is thereby clearly and explicitly given to her in fee. In order to cut that down to a life-estate, the subsequent words must be equally clear and unambiguous. The object of the testator was, that, if his daughter should continue unmarried, she should take the fee; if she married, she was to be protected from her husband; if she had issue, they were to be benefited; but if she had no issue by marriage, *or if her children did not live to the age of
 *924] twenty-one, then the estate was to go to the nephews; but no such event has happened. [MAULE, J. The words of the second clause are very singular; the testator speaks of his daughter having "child or children lawfully begotten in wedlock," as though he meant to provide against the case of a child begotten before wedlock, though born afterwards.] In the first clause, no time is mentioned when the estate is to go over; some explanation of what was meant was therefore necessary: but it is not necessary to contend, on the part of the defendant, that the child or children subsequently mentioned, may not mean legitimate children; for otherwise the clause would be void; *Dover v. Alexander*, 2 Hare, 275. It is possible, however, that a devise to illegitimate children may have been intended; but even then the event has not happened. If the two parts of the second clause are to be read as one, it must either mean that, or the word "not" must be rejected. The words "not" and "never" have been frequently rejected not only in wills, but in other instruments; as in the case cited in *Simpson v. Vaughan*, 2 Atk. 32, and *Bache v. Proctor*, 1 Dougl. 384; and in *White v. Supple*, 2 Dru. & War. (Irish) 475, where SUGDEN, C., held that "and" might be taken to mean "or" and "or" to mean "and." The words "provided she at a proper time intermarries," at the beginning of the first limitation, will govern all the others. In Jarman on Wills, vol. i. p. 752, it is said: "When a contingent particular

estate is followed by other limitations, a question frequently arises whether the contingency affects such estate only, or extends to the whole series. The rule in these cases seems to be, that, if the ulterior limitations be immediately consecutive on the particular contingent estate in unbroken continuity, and no intention or purpose is expressed with reference *to [925 that estate in contradistinction to the others, the whole will be considered to hinge on the same contingency; and that, too, although the contingency relates personally to the object of the particular estate, and therefore appears not reasonably applied to the ulterior limitations. Thus, where an estate for life is made to depend on the contingency of the object of it being alive at the period when the preceding estates determine, limitations consecutive on that estate have been held to be contingent on the same event, for want of something in the will to authorize a distinction between them."(a) In *Moody v. Walters*, the limitations in a marriage settlement were, to the husband and wife successively for life, remainder to the first and other sons in tail-male, with remainder, in case the husband should die without leaving any issue male then born, and alive, and leaving his wife with child, to such after-born child or children, if a son or sons, remainder to the brother of the settlor for 120 years, if he should so long live; remainder to trustees, for preserving contingent remainders; remainder to his first and other sons in tail-male, with reversion to the settlor in fee. Lord ELDON, C., expressed a strong opinion (though the case was not decided on the point) that the husband having died, leaving a son, the limitation to the posthumous son would not (if there had been one) have arisen, and that the ulterior limitations failed with it: and his lordship thought that such would have been the construction, had the instrument been a will.

Sir T. Wilde, Serjt., in reply. Whenever a marriage has been held a condition, upon the non-performance of which the estate is to go over, it has been where the object was, to enlarge the wife's interest, and not to *diminish it. Here, it is insisted that the estate of the married [926 daughter is to be diminished in order to protect her against her husband, by giving her a life-estate, during which she is not protected; nor is there any protection to her from strangers, in case she should not marry. The words at the commencement of the first clause, as to inter-marriage, may be rejected as surplusage. A child born in wedlock would probably be presumed to have been begotten in wedlock; at any rate, the court would not go into such an inquiry. Taking the whole will together, there is no incongruity that the estate should go over if the daughter had no children. As to the claim set up on behalf of Bethel, it is said that a different intention as to the nature of the devise, appears in the latter part of the will; and the reason for this is presumed from the difference of the period of distribution of the estate; but the alteration of the intention must

(a) Citing *Davis v. Norton*, 2 P. Wms. 390; *Doe dem. Watson v. Shipphard*, 1 Dougl. 76, *Fearn's Cont Rem.* 236; and *Moody v. Walters*, 16 Ves. 283.

be manifest on the face of the will. The suggestion as to reading in a parenthesis the words in the first clause, excepting the 100*l.* from the devisee to Luke, cannot prevail; otherwise the words "heirs and assigns" would be made to apply to personalty. *Cur. adv. vult.*

The following certificate was afterwards sent by the judges:—

"We are of opinion that Eliza Aspinall became entitled to the fee-simple in the real estate, and to the absolute interest in the leasehold estate, of the testator, Elkanah Aspinall.

"We are of opinion that Luke Aspinall, and Bethel Aspinall, respectively, did not take any interest, either in such real estate, or in such leasehold estate, under the will of the said testator.

"N. C. TINDAL.

"T. COLTMAN.

"W. H. MAULE.

"W. ERLE."

*927]

*NICHOLLS v. PAYNE. Nov. 13.

By the 5 & 6 Vict. c. 116, s. 1, any person not being a trader, upon giving notice twice in the London Gazette, may present a petition for protection from process to the court of bankruptcy, containing certain matters; and a commissioner may thereupon give such protection to the petitioner; and upon the presentation of such petition, the petitioner's estate is to vest in the official assignee nominated by the commissioner acting in the matter of such petition.

By sect. 4, after certain preliminary proceedings, the commissioner may make a special order for the protection of the person of the petitioner from all process, and for the resting of his estate in an official assignee, to be named by such commissioner, together with an assignee to be chosen by the creditors.

By sect. 10, if any action is brought against any petitioner in respect of a debt contracted before the date of the petition, "it shall be a sufficient plea in bar of such action, that such petition was duly presented, and a final order for protection and distribution made by a commissioner duly authorized; whereof the production of the order signed by the commissioner, with proof of his handwriting, shall be sufficient evidence."

Held, that a plea framed upon that statute, was properly pleaded in bar of the further maintenance of the action, where it showed that the defendant presented a petition before, and that a final order was made after, action brought.

Seemle, that such plea need not state the insertion of the notice in the Gazette,

Or the particulars of the petition,

Or that an insertion order was made.

But *seemle*, that it should state that the final order was made either for the protection of the petitioner and the distribution of his estate, (within the terms of the tenth section,) or for his protection and the resting of his estate in the official assignee and the creditors' assignee, (within the terms of the fourth section.)

ASSUMPSIT, for work and labour and materials, and for money due upon an account stated.

Plea: that the plaintiff ought not *further* to maintain his aforesaid action thereof against the defendant; because, after the contracting of the debts and causes of action in the declaration mentioned, and before the commencement of the suit, to wit, on the 6th of May, 1843, the defendant, then not being a trader, and having then resided for twelve calendar months in London, and according to the directions and provisions of the statute

made and passed in the sixth year of the reign of her present majesty, Queen Victoria, for *the relief of insolvent debtors,(a) hav- [928

(a) 5 & 6 Vict. c. 116, s. 1, enacts, "that if any person, not being a trader within the meaning of the statutes now in force relating to bankrupts, or if any person, being such trader, but owing debts amounting in the whole to less than 300*l.*, shall give notice, according to the schedule to this act annexed, to one fourth in number and value of his creditors, and shall cause the same notice to be inserted twice in the London Gazette and twice in some newspaper circulating within the county wherein he resides, he may present a petition for protection from process, to the court of bankruptcy, if he has resided twelve calendar months in London, or within the London district, or to the commissioner of bankrupt in the country, within whose district he may have resided twelve calendar months; which petition shall have annexed to it a full and true schedule of his debts, with the names of his creditors, and the dates of contracting the debts, severally, the nature of the debt, and the security (if any) given for the same, and also of the nature and amount of his property, and of the debts owing to him, with their dates, and the names of his debtors, and the nature of the securities (if any) which he may have for such debts, and which petition shall also set forth any proposal which he may have to make for the payment, in whole or in part, of his debts; and it shall thereupon be lawful for the judge or commissioner of the court of bankruptcy, to whom by any order of the court, as hereinafter provided, the same shall be referred, or for the commissioner in the country to whom the petition shall be presented, to give, upon the filing of such petition, a protection to the petitioner from all process whatever, either against his person or his property of every description; which protection shall continue in force, and all process be stayed, until the appearance of the petitioner in court, as hereinafter provided: and upon the presentation of any such petition, all the estate and effects of the petitioner shall forthwith become vested in the official assignee, who shall be nominated by the commissioners (*sic*) acting in the matter of the said petition; and such official assignee shall and may forthwith take possession of so much thereof as can be reasonably obtained and possessed without suit; and the said official assignee shall hold, and stand possessed of the same, in like manner as official assignees hold and possess estates and effects under and by virtue of the statute relating to bankrupts."

Sec. 4 enacts, "that the commissioner so authorized, or the commissioner in the country, (as the case may be,) shall, on the day notified by such notice as aforesaid, proceed to examine, upon oath, the petitioner, and any creditor who may attend such examination, and any witness whom the petitioner or any creditor may call, and the said commissioner may adjourn the examination from time to time, and summon to be examined before him any debtor of such petitioner, or any creditor of such petitioner, or any other person whose evidence may appear necessary for the purposes of the inquiry; and if it shall appear to the said commissioner that the allegations in the petition, and the matters in the schedules, are true, and that the debts of the petitioner were not contracted by any manner of fraud or breach of trust, or any prosecution against the petitioner, whereby he had been convicted of any offence, or without having at the time of becoming indebted reasonable assurance of being able to pay the debts, and that such debts were not contracted by reason of any judgment in any proceeding for breach of the revenue laws, or in any action for breach of promise of marriage, &c.; and that the petitioner has made a full discovery of his estate, effects, debts, and credits, and has not parted with any of his property since the presenting of his petition, it shall then be lawful for the said commissioner to cause notice to be given that on a certain day, to be named therein, he will proceed to make an order, unless cause be shown to the contrary; which order shall be called a final order, and shall be for the protection of the person of the petitioner from all process, and for the vesting of his estate and effects in an official assignee, to be named by such commissioner, together with an assignee to be chosen by the majority in number and value of the creditors who may attend before the commissioner on such day, or for the carrying into effect such proposal as the petitioner shall have set forth in his petition, provided that the consideration of such final order may be adjourned, from time to time, by the commissioner without any fresh notice: provided always, that it shall be lawful for the said commissioner, if he shall think fit, to direct, in such final order, some allowance to be made for the support of the petitioner out of his estate and effects."

Sec. 10 provides and enacts, "that if any suit or action is brought against any petitioner for, or in respect of any debt contracted before the date of filing his petition, it shall be a sufficient plea in bar of the said suit or action, that such petition was duly presented, and a final order for protection and distribution made by a commissioner duly authorized; whereof the production of the order, signed by the commissioner, with proof of his handwriting, shall be sufficient evidence."

ing then given due notice, did then duly present a petition for protection
 *929] from process, to the court of bankruptcy, according to *the provisions of the said act; which petition was then duly subscribed by the defendant, and contained all such matters and things as are required by
 *930] the said *act; and, on the presenting of the said petition, all the estate and effects of the defendant forthwith became vested in one William Whitmore, then being an official assignee, duly nominated by Mr. Commissioner Fane, then acting in the matter of the said petition, according to the provisions of the said act; and the said petition was afterwards, to wit, on the 6th of May, aforesaid, duly filed in the said court, pursuant to the directions in the said act contained: that, after the filing of the said petition, and after the contracting of the debts and causes of action in the declaration mentioned, and after the commencement of the action, to wit, on the 19th of July, 1843, the said Mr. Commissioner Fane, then being a commissioner of the said court of bankruptcy, duly authorized in that behalf, and to whom, by an order of the said court, the said petition had then been referred, did, after having duly examined the defendant, make a final order, according to the provisions of the said act, for the protection of the person of the defendant from all process, and for the vesting of his estate and effects in the said William Whitmore, being an official assignee as aforesaid, then named in that behalf by such commissioner, according to the provision of the said act; and that the said order still remained in full force and effect:—Verification and prayer of judgment.

Special demurrer; assigning for causes—that it did not appear with sufficient certainty in the said plea, that the notice so given as in the said plea was alleged, was inserted twice in the London Gazette, and twice in some newspaper circulated within the county wherein the defendant resided, according to the statute in that case made and provided—that the said plea should have alleged how the notice therein mentioned was a due notice, and that the allegation that the said notice was a due notice, was not sufficient—that *the said plea should have stated what matters and
 *931] things the said petition did contain, and not merely have alleged that it contained all such matters and things as are required by the said act—that the plea was insufficient, informal, and ambiguous, in that it did not appear by the said plea with sufficient certainty that the said Mr. Commissioner Fane, at the time of the presenting of the said petition, or at the time of the said estate and effects of the defendant becoming vested in the said William Whitmore, or of the said William Whitmore being nominated official assignee, as in the plea first-mentioned, was a commissioner of the said court of bankruptcy, and that it was merely stated that he (Mr. Commissioner Fane) was acting in the matter of the said petition—that the said plea did not show that the final order therein mentioned was a final order for distribution, according to the provisions of the said act—that the said plea did not show that the said order was for the vesting of the estate and effects of the defendant in the said official assignee together with an assignee

chosen, or to be chosen, by the majority in number and value of the creditors, according to the said statute, nor did the plea allege any excuse for the order not being so made—that the said plea was pleaded in bar of the further maintenance of the action, whereas it showed matters which, if a defence at all, were so in bar of the whole action at and from its commencement—and that the said plea was in other respects insufficient.

Manning, Serjt., in support of the demurrer. The plea should not have been pleaded in bar of the further maintenance of the action; for that form of plea admits the cause of action at the time of action brought and sets up a defence arising afterwards, as in the ordinary case of a plea *puis darrein continuance*. [*TINDAL, C. J. Does not the defence here arise from the date of the final order? If so, it admits the cause of action. [*932 ERLE, J. The *vesting* order was before action commenced; and that would not be a bar. The *final* order is the bar; and that is stated to have been made after action commenced.] The defence arises under the tenth section of the statute.(a) The final order is stated to have been made on the 19th of July, 1843; and the writ of summons issued on the 13th of December, 1843, after the final order. [ERLE, J. The plea expressly says that the final order was made “*after* the commencement of the action, to wit, on the 9th of July, 1843:” the day is immaterial; the allegation, material.]

It is not stated that the requisite notice was inserted twice in the London Gazette, as required by sect. 1 of the statute.(b) The power of the commissioner to grant an interim order, depends upon the requisitions of the statute being complied with. [TINDAL, C. J. Was it necessary to allege any notice, as there was a final order? The tenth section seems to empower the defendant to rest upon that.] As this is a limited jurisdiction, the authority must fully and clearly appear. [TINDAL, C. J. The tenth section says that it shall be a *sufficient plea in bar* to allege that such petition was duly presented and that a final order was made: your demurrer says it is *not sufficient*.] The demurrer imports that the defendant has not shown, as he was bound to do, that the petition was *duly* presented. [TINDAL, C. J. Then what is the use of the tenth section?] To give a bar which is not given elsewhere. [TINDAL, C. J. Would not that follow from the provisions of the act which take the property out of the petitioner, by analogy to other provisions of the bankrupt law? The statute [*933 *says, “it shall be a sufficient plea in bar,” not a sufficient defence.] The section speaks of “*such* petition;” it would not be sufficient for the plea to use that term alone. [MAULE, J. Supposing the act gives a form of plea, is it a condition precedent that the defendant should have petitioned?] He must show that he has acted in conformity with the act. [MAULE, J. I think the policy of the act was, to preclude inquiry after the matter had gone before the court. TINDAL, C. J. You get into this inconsistency: if all this matter is necessary to be stated in the plea, the proof of it is clearly not required at the trial; for the section goes on to say that the

proof of the final order is all that is to be required. *ERLE, J.* Under the former insolvent act, a defendant might plead his discharge. This act gives a shorter plea, and limits the proof at the trial.] Still that does not get over the difficulty raised by the words "such petition;" the defendant must show the facts upon which the petition was presented. [*TINDAL, C. J.* You might have traversed the allegation that the petition was duly presented. *MAULE, J.* The plea shows that he was a person who might present a petition under the act, and that he did present one; surely that is enough.] The petition should contain the matter required by the act; and the defendant must show that it did so. [*ERLE, J.* It appears to me he has stated the matter more amply than the section required him to do.] The plea must *show* that a *proper* petition was presented. The mere allegation that it was presented in compliance with the act is not sufficient. The plea should have stated the facts, that the court might judge whether or not there had been a compliance with the act. A party could not plead that, by a certain deed, certain property was vested in him.

The plea is further insufficient, in not stating that Mr. Fane was a commissioner at the time when he *made the interim order. [*TINDAL, *934*] *C. J.* The tenth section (a) does not make it necessary to state the interim order.] The commissioner would not be authorized to make the final order, unless he was the same commissioner who made the interim order. [*TINDAL, C. J.* How does that appear? Suppose the commissioner who had made the interim order, had died?] It must be shown that Fane was properly acting as commissioner; he might have acted by intrusion or usurpation. The first section (b) shows that the effect of the interim order is to vest the property in the official assignee; and if the vesting of property in another party operates as a bar, as suggested by the Lord Chief Justice, the interim order would operate as a bar. [*ERLE, J.* Is not the interim order provisional only?] To some intent it is so. But if a final order is not refused, the property will remain in the official assignee.

Further, it does not appear that Whitmore was properly appointed as the official assignee under the insolvency; and if he was not, the statutory bar would not arise. The plea says he was named by Mr. Commissioner Fane, but without stating Mr. Commissioner Fane to be, at that time, a commissioner of the court.

The plea does not show that the final order was "for distribution," according to the terms of the tenth section. (a) It merely says that the commissioner made "a final order, according to the provisions of the said act for the protection of the person of the defendant," that is to say, that it was according to the provisions of the act in that respect. [*MAULE, J.* The fourth section (b) does not mention the distribution; it says that the final order "shall be for the protection of the person of the petitioner from all *935] process, and for the vesting of his estate and effects in an official assignee, together with *an assignee to be chosen by the majority, in

number and value, of the creditors who may attend before the commissioner.”] That is another fault in the plea, which alleges the vesting of the estate in the official assignee alone. [ERLE, J. That section(a) speaks of a creditors’ assignee “to be chosen.” TINDAL, C. J. Suppose that none was chosen.] It should have been so stated in the plea. Either way it is bad. [TINDAL, C. J. There is certainly a difficulty in this point; that the plea does not follow the words of the tenth section,(b) but falls back upon the fourth, and affects to describe the final order as there specified; but then it should have shown that the estate was vested in the official assignee and the creditors’ assignee.]

Talfourd, Serjt., *contra*. It might be that no creditors attended on the day appointed. [MAULE, J. Probably in that case the commissioner would have adjourned the meeting.] The plea says that the commissioner has made a final order, which is all that is required by the tenth section; every thing therefore may be presumed in its favour. [MAULE, J. But you do not show that it is a final order, either in the words of that section, or in those of the fourth. ERLE, J. The plea does not adapt itself to any form of final order described by the statute.]

The learned serjeant then prayed, and obtained Leave to amend.

(a) Sect. 4, *suprà*, 928, n.

(b) *Suprà*, 929, n.

*WALLER v. DEANE. Nov. 13.

[*936

A proviso, (in a court of requests’ act,) giving costs to the defendant, *where the jury, upon the trial of the cause, find damages under 40s.*, does not apply to a judgment by default.

DEBT. By the notice annexed to the writ of summons issued in this case, the plaintiff claimed 1*l.* 13*s.* 6*d.* for debt, and 1*l.* 10*s.* for costs. He afterwards declared, demanding 5*l.* for goods sold, and 5*l.* on an account stated. The defendant not having pleaded, judgment was signed on the 24th June last for 10*l.* debt and 1*s.* damages. On the 2d of August a *testatum fieri facias* commanding the sheriff to levy 10*l.* debt and 5*l.* 5*s.* 6*d.* damages for the detention of the debt and for costs. This writ was endorsed to levy 8*l.* 10*s.* 4*d.* besides, &c.(c)

Channell, Serjt., moved to set aside the *testatum fi. fa.*, and enter a suggestion on the record under the Middlesex court of requests act,(d) upon affidavits stating the above facts, and alleging that the defendant, at the time of the commencement of the action, lived within the jurisdiction of that court, and was liable to be summoned thereto for the debt in question. He admitted that the 19th section of the act(e) speaks only *of [*937

(c) It appeared by the affidavits, that the plaintiff had previously commenced proceedings in the Middlesex court of requests, but that he had abandoned them on the alleged ground that the defendant was not resident within the county.

(d) 23 G. 2, c. 33, as to which see 4 N. & M. 89 n., 90 n., 94 n., *antè*, Vol. VI., p. 986.

(e) Which enacts, “that in case any action of debt, or action upon assumpsit, shall be commenced and prosecuted in any of his majesty’s courts of record at Westminster, and the de

cases where the jury *upon the trial of the cause* found a *verdict* for less than 40s., and expressed a doubt whether it would extend to a case of judgment by default. (a) [MAULE, J. The reason why the statute was not made applicable to a judgment by default may have been that the legislature thought that if a defendant did not defend the action, he might let judgment go by default, with very little expense, in the superior court.]

The learned serjeant

Took nothing.

defendant or defendants, at the time of such action brought, shall live or reside in the said county of Middlesex, and be liable to be summoned to the said county court, and the jury, upon the trial of such cause, shall find the damages (not *debt*, or damages) for the plaintiff under the value of 40s., unless the judge shall, in open court, certify on the back of the record, that the freehold, or title to the plaintiff's lands, principally came in question, or that an act of bankruptcy principally came in question, at such trial, then and in such case, no costs shall be awarded to the plaintiff in such action, but the defendant or defendants shall be entitled to, and recover, double costs of suit." Taking the terms of this statute *literally*, if a plaintiff had a verdict for 1000l. debt and 1s. damages for the detention, he would appear to be liable to pay double costs of suit, the damages found by the jury on the trial of the issue being under 40s.

(a) Supposing the statute to extend to a case where the *judgment by nil dicit* was for less than 40s. in an action of debt, or where the damages were laid or were assessed at less than 40s. in an action of *assumpsit*, there would be no ground for saying that it extended to a case where the plaintiff actually recovered, by the judgment of the court, more than 40s. In the principal case, instead of any reduction by the verdict of a jury, there was nothing to bring the demand below 40s. except the notice subjoined to the writ of summons, and the restriction as to the amount to be levied, intimated to the sheriff by the endorsement on the writ of execution. Even in the case of an assessment of damages upon a writ of inquiry after interlocutory judgment in *assumpsit*, though there would be the finding of an inquest by a jury, there would not be, within the terms or the intent of the statute, the finding of a jury "upon the trial of such cause."

*938] *HARRISON and Others v. HARRISON and Others. Nov. 25.

A. devises real estate to "all his children, as tenants in common during their respective lives, and afterwards to their issue, as tenants in common." A.'s children are devisees of an estate-tail, as tenants in common; A.'s grandchildren take nothing.

The following case was directed to be stated for the opinion of this court, by an order of Lord LANGDALE, M. R.:

John Harrison was, at the date and execution of his will hereinafter stated, and thence down to and at the time of his decease, seised, to him and his heirs, of divers lands and hereditaments; and, being so seised, he made and published his last will and testament in writing, dated the 8th of May, 1826, which was duly executed and attested as was then by law required for the devise of freehold estates; and he thereby devised all the residue of his real estates situate in England unto and to the use of all his children, as tenants in common, during their respective lives, and, afterwards, to their issue, as tenants in common.

John Harrison died in May, 1826, without having revoked or altered his said will, leaving Emily Louisa Harrison, Tertius John Harrison, Horatio Shirley Harrison, and John Orlando Harrison, his only children, him surviving; all of whom were born before the date of the will, but none of whom was married before the testator's death.

In February, 1832, Emily Louisa Harrison intermarried with Isaac Skidmore, and there is issue of such marriage, four children—Cecilia Louisa Skidmore, Tertius Benjamin Skidmore, Horatio Thomas Walter Skidmore, and Owen Orlando Skidmore.

Tertius John Harrison is married, and has issue one child, Augusta Louisa Harrison.

*The questions for the opinion of the court are, first, what estate [939 the children of the testator took in his residuary real estate under the will. secondly, whether the children of the testator's children, or any, and which, of them, took any, and what, estate therein, under the will.

The case was first argued in last Trinity term.(a)

Byles, Serjt., for the plaintiffs (the testator's children). The question in the case is, whether, under the testator's will, the plaintiffs took an estate for life only, or an estate-tail; it is submitted that they took the latter. *Robinson v. Robinson*, 1 Burr. 38; *Doe d. Cock v. Cooper*, 1 East, 229; *Denn d. Webb v. Puckey*, 5 T. R. 299, are authorities to show that where, in a will, an estate for life is given, and there are words of limitation afterwards, no words, however strong, will prevent the operation of the rule in *Shelley's* case, 1 Co. Rep. 93, b.(b) The argument on the other side will probably be, that if the word "issue" in this will is to be construed as a word of limitation, as contended for by the plaintiffs, and not as a word of purchase, there are many of the issue that cannot take; but under no construction can *all* the issue take. The argument will be that the children take an estate for life only, and the grandchildren born within the law of perpetuity, take an estate in fee. A limitation to great-grandchildren would be too remote: but the word "issue" would, *ex vi termini*, include all generations of issue. All the issue cannot take. To hold that the "issue" of the testator's children take as purchasers, would be chalking out a new line of *inheritance similar [940 to gavelkind. The term cannot, therefore, include all descendants.

But if "issue" be construed as a word of limitation, none of the issue contemplated will be excluded; all will take successively. The only difficulty is, that which arises upon the introduction of the words "as tenants in common" as applied to the issue. They may be satisfied, however, by all the eldest sons taking as tenants in common. [TINDAL, C. J. There were four children, and each had several children; the latter would not take as tenants in common in tail.] The words, however, are superfluous. Words of distribution and division will not prevent the operation of the rule in *Shelley's* case. But these are not words of distribution and division as between individuals, but only as between classes or families; *Doe d. Blandford v. Applin*, 4 T. R. 82. In *Doe d. Cock v. Cooper* the words "as tenants in common" were absolutely rejected; which is not asked for here.

(a) 5th June. Before Tindal, C. J., and Coltman, J

(b) Et vide ib. 104 a, S. P. As to the operation of this rule, see 2 Mann. & Ryl. 492 (c), 1 N. & M. 657 (g), 661 (b).

[TINDAL, C. J. There were other words in that case, which are not to be found here. Here, the testator appears to have meant—tenants in common *inter se*.] If the words “as tenants in common” were omitted in the first instance, what effect could the court give to them when they occurred at the end of the clause? In *Jesson v. Doe d. Wright*, 2 Bligh, 1, [reversing the judgment in *Doe d. Wright v. Jesson*, 5 M. & S. 95, and overruling *Doe d. Strong v. Goff*, 11 East, 668;] *Doe d. Atkinson v. Featherstone*, 1 B. & Ad. 944; *Doe d. Chandler v. Smith*, 7 T. R. 531; *Tate v. Clark*, 1 Beav. 100, and *Greenwood v. Rothwell*, ante, Vol. V. p. 628, 6 Scott, N. R. 670, there were words of distribution between individuals, which *941] were rejected in order to give effect to the general intention *of the testator; but here, as the distribution is between classes, no such excision is required. The word “estates” is not sufficient to turn what would otherwise be an estate-tail, into an estate in fee; *Whitelock v. Heddon*, 1 B. & P. 243. *Lees v. Mosley*, 1 You. & Col. 589, shows that the word “issue” may be either a word of purchase or of limitation, according as it will best effectuate the intention of the testator.

Dowling, Serjt., for the defendants (the testator’s grandchildren). The testator’s children took only an estate for life, and the grandchildren take the remainder in fee. There are no words in the will giving cross remainders; and no devise over: the cases cited, therefore, are inapplicable. If the testator had intended to create an estate-tail, proper words for that purpose could easily have been introduced. Suppose all the children took estates-tail, then if three of them had died, having issue, during the lifetime of the testator, the will having been made before the 7 Will. 4, 1 Vict. c. 26, there would have been a lapse as to their shares. the heir would have taken three shares not intended for him, and the grandchildren, issue of the three deceased children, would have been unprovided for, contrary to the clear intention of the testator. This shows that the greatest inconvenience would follow from adopting the construction contended for on the other side. No question arises upon the rule against perpetuities, or as to the application of the rule in *Shelley’s* case, which does not affect dispositions in a will where the word “heirs” is not used. The rule itself did not originate with that case; it is as old as the Y. B. 18, E. 2, fo. 577,(a)

(a) That case was as follows:—“John Abel was held to B. of L., and bound by statute-merchant, in 100l., to be paid, &c.; and because he did not keep his days we sued in Chancery, where a writ was granted us to the sheriff of Kent, to take his body according to the statute-merchant. Whereupon the sheriff returned the writ into this court, that the said John was dead; wherefore the writ was granted us to the said sheriff, that he should deliver us all the lands which the said John had the day of the cognisance; to which writ the sheriff returned, that he had delivered all the lands which John had at the time of the cognisance, in fee, to other debtors (meaning dettees) to whom he had made other cognisances, except the manor of Fortysgray, in which he had nothing but for term of life; whereas, we say, that although the sheriff has returned that John had nothing in the said manor but for term of life, the same John purchased the same manor to him and to Matilda, his wife, and to Walter, his son, and to the heirs of the body of Walter begotten, and if he died without heir of himself, the said manor should remain to the right heirs of John, and that Walter died without heir of himself, and that John survived him, and died seised, and that after his death John, his son, entered as son and heir: and this we will aver, and we pray a writ to the sheriff.

*and depends upon the feudal law, which always preferred to give an estate by descent rather than by purchase. [COLTMAN, J. Can- not the rule in *Shelley's* case *be applied where words tantamount to the word "heirs" are used, such for example as the word

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[*943]

Mutf. (Mutford, Justice of C. P.) Do you pray a *scire facias* against the heir, or a writ to the sheriff to deliver the manor to you until you have levied the debt?

The attorney said, Sir, we are in your judgment (*en vos agars.*)

Clavering. By his saying, John Abel had but for term of life.

Rudenale. (*Quere*, Reeveswell.) After the death of Walter he had fee and right, and freehold.

Devom. (John de Denum, Serjt.) We do not understand that execution ought to be made in this manner for the cognisance of John; for John in his lifetime had but freehold; and we pray judgment if this land, in which he had but freehold, ought to be charged by his cognisance after his death.

Cant. (Cantebrig.) That you cannot say; for if he had committed felony, the land would have escheated to the chief (that is the next immediate) lord.

Devom. That I deny you.

Cant. I prove it to you; for if he in the remainder should have brought a *scire facias*, he must have brought it as heir of John; whereas he (John) could not have an heir if he had been a felon, for the blood was corrupted (or cut off—*recoupe.*)

Devom. In that case, although he would be named as heir of John, he should demand nothing by him, but by reason of a remainder; and should count how the donor was seised, and gave to the said John and Matilda, and Walter, and the heirs of the body of Walter, and the remainder after their decease limited to him. Nor in this case ought he to make descent from his father to him, but to count according to the form of the gift. (*Vide antè*, VI. 536, *contrà.*)

Cant. If John had aliened, and had bound himself and his heirs to warranty, in that case the right heir, if he demanded by *scire facias* or by writ of *formedon* in the remainder, should have been rebutted by the deed of John; and if he John could alien the land he might charge it.

Devom. Let us plead the case in which we are, for in your case it would be no marvel; for if the father disseised the son and aliened over, and bound himself and his heirs to warranty, the heir should be rebutted after the death of his father; and that by the warranty. If the right heir of John had granted the reversion of this land which ought to remain to him after the death of John, remainder to such a person, and by fine, and he (the conusee of the fine) sued a *quid juris clamat* against John, and John showed his estate to the court, he should not attorn, and that is because he had more than freehold; wherefore, &c.

Clavering. But I put the case, that John had aliened to a stranger, without clause of warranty, his right heir would not have been ousted of action by the deed of his father, because he had nothing but freehold.

Stonore, Justice of C. P. Then the fee and the right after the death of Walter was in no person.

Devom. Not in his person.

Trivaignon. I prove to you that it is; for by the fine, no right can accrue to the right heirs of John in his lifetime; but in some person it ought to remain; wherefore, after the death of Walter, it ought to remain in the person of John.

Westb. If the right heir of John brought a *scire facias* against the terre-tenant, it would be no answer to the tenant to say that the fine was executed, inasmuch as John and Matilda and Walter were seised by virtue of the fine; because the fine would not be executed before the fee and right were executed in a person, and this could not be except in the person of the right heir of John; wherefore John had but freehold, and consequently the land ought not to be charged by his cognisance; and, on the other hand, if Matilda had survived John, and had been impleaded by a stranger, and he (she) had prayed aid of the right heir of John, he (she) should not have it; whereby it appears that the right did not vest in him by John, but by remainder.

Stonore. But if Matilda had survived John, and had been impleaded, and was on the point of losing the land by default after default, and the right heir of John came and showed his estate to the court, he should have been received, &c.; and, on the other hand, if Matilda had survived John and had aliened in fee, by this alienation, John (the son) could not enter, because the right of John is stronger and further in law than the estate of Matilda; wherefore your position does not apply (*vestre dit ne se lye pas.*)

Schurd. If tenements had been given in fee-tail to John Abel and the heirs of his body

“issue?”] Where such words are used, effect will be given to them with
 *944] the view of effectuating the object of the *testator, by the doctrine
 of *cy pres*; but not as coming within that rule. Mr. Jarman,
 indeed, was at one time of opinion that the word “issue” was as strong
 as the word “heirs,” and that where the former word was accompanied
 with words of modification inconsistent with an estate-tail, such superadded
 words should be rejected; 2 Jarm. Pow. Dev. 526; but he does not appear
 to have retained that opinion so strongly in his later work upon Wills.
 *945] [TINDAL, C. J. In the former work *that learned person says, (p.
 434,) “In respect of the limitation to the heirs, we have before
 suggested that it is immaterial whether they are described under that or any
 other denomination, since it is clear that in any case in which the word
 ‘issue’ or ‘son’ has been construed to be a word of limitation, and fol-
 lows a devise to the parent for life, or for any other estate of freehold, he
 becomes tenant in tail by the operation of the rule in *Shelley’s* case. It is
 obvious that in such cases, the words in question are construed as synony-
 mous with ‘heirs of the body,’ and, consequently, the effect is the same
 as if those words had been used.” That shows that in his opinion, where
 “issue” is used as a word of limitation, the rule in *Shelley’s* case would
 apply.] In his treatise on wills he has this passage, (p. 330,) “So far,
 the cases present little that can be the subject of controversy; but difficulty
 frequently arises from the introduction into the devise, of expressions incon-
 sistent with the course of devolution or enjoyment under an estate-tail, as,
 that the issue shall take in equal shares, or as tenants in common, or that the
 estate shall go over in case they die under twenty-one, which has been re-
 garded as inapplicable to issue indefinitely. If the courts had uniformly
 rejected these inconsistent provisions as repugnant, immense litigation and
 discordancy of decision would have been prevented. This has been shown
 to be now the established rule in regard to limitations to heirs of the body,
 and there might seem, upon principle, to be strong ground to contend for

begotten, and John had aliened them and bound himself and his heirs to warranty, whereupon
 the right heir of John had brought his writ of *formedon* in the descender, he should not be
 rebutted by the deed of his father,—as to say that he has assets by descent in fee-simple,—if he
 has no other lands than those which are thus limited to him by the remainder aforesaid; where-
 fore it appears he had but freehold; and, on the other hand, if those lands had been held by
 foreign services and John had died, his right heir within age and the chief lord had happened the
 wardship, and the infant should have had an assize against him; wherefore, &c.

Per. (Berrington.) Sue execution.

Devom. Execution he ought not to have; because he has released to us every manner of
 action and demand, which he could have by reason of this debt, &c. And that he has received
 the same debt, see here his deed, &c.

And the attorney would not grant or deny this, but departed from the bar.

Devom. Now, we pray that this execution cease for ever.

Per. That we shall not do; but we award that this execution cease.

And the enrolment was “*cesset inde executio.*”

Lord Coke refers, in support of the rule, to “40 E. 3, fo. 9 a, b; (*The Provost of Beverley’s*
case, H. 40, E. 3, fo. 9, pl. 18,) 38 E. 3, fo. 31 b, (M. 38 E. 3, fo. 31,) 24 E. 3, 26 b, (M. 24
 E. 3, fo. 36, pl. 49, *ut videatur*; *tamen quare*), 27 E. 3, fo. 87 a, (citing evidently from the
 first edition of the Year-books, corresponding with M. 27 E. 3, fo. 11, pl. 40, in the 2d ed.)
 and divers other books.” See 1 Co. Rep. 104 a.

the application of the same doctrine to the cases under consideration. The word 'issue' is not less extensive in its import than heirs of the body: it embraces the whole line of lineal descendants; it is used in the statute *De donis*, 13 E. 1, c. 1, in some instances, at least, synonymously with heirs of the *body, and the cases are very numerous in which it has been held to create an estate-tail. It will be seen, however, that, in some instances, the word *issue* has been diverted from its general legal acceptance by the occurrence of words of distribution, or other expressions which point at a mode of devolution or enjoyment inconsistent with an estate-tail, and have been decided to be insufficient to convert the term *heirs of the body* into children, or to prevent its conferring an estate-tail." There are some authorities referred to in Roll. Abr. tit. *Estate*, (X), (Y), (Z), showing that the words "heirs of the body" are words of limitation. [*946]

But the word "issue" is not necessarily a word either of limitation or of purchase: it is of a most flexible quality, and is very different in its effect from the term "heirs of the body." "Issue" in common parlance means children; not grandchildren; as if it is said—A. B. died leaving issue—it would mean that he left children. It is contended on the other side that the words "as tenants in common," with reference to the estate to be taken by the issue, must be rejected; but even if these words were struck out, the words "afterwards to their issue" would remain; and to make the argument available, the words "during their respective natural lives," should also be struck out. But the court will not strike out words from a will unless they are clearly inconsistent with the whole will.

In *Jesson v. Doe d. Wright* the words were "heirs of the body," with words of partibility afterwards; that case therefore has no application here. Even the words "heirs of the body" are not always treated as words of limitation, if a different intention be manifest from the whole of the devise; *Lowe v. Davies*, 2 Ld. Raym. 1561; *Lisle v. Gray*, 2 Lev. 223; *Goodtitle d. Sweet v. Herring*, 1 East, 264. Where the word "issue" is found in its present collocation;—that is, with words of ulterior distribution superadded—it is held to be a word of purchase; *Doe d. Davy v. Burnsall*, 6 T. R. 30; *Burnsall v. Davy*, 1 B. & P. 215; *Doe d. Gilman v. Elvey*, 4 East, 313; *Merest v. James*, 1 Brod. & B. 484, 4 J. B. Moo. 327; *Lees v. Morley*, 1 You. & Col. 589; *Greenwood v. Rothwell*, ante, Vol. V. 628, 6 Scott, N. R. 670; and the cases collected in 2 Jarm. on Wills, p. 246. Where there is a limitation to heirs special, an ulterior limitation to heirs general will not interfere with the rule in *Shelley's* case. *Mogg v. Mogg*, 1 Mer. 654, may perhaps be relied upon on the other side, where words of distribution were superadded to the word "issue," and the court held that word to be one of limitation. But that case must be considered as overruled by those just referred to. Mr. Jarman in his Treatise on Devises, (a) treats that case as an authority for his position that a devise to A. for life, remainder to his issue and the heirs of such issue, with or without a limi-

(a) 2 Powell on Devises, by Jarman, 250.

tation over, is an estate tail in A. But in his Treatise on Wills, vol. ii. 341, he adds the following note to the passage :—"I cite this case with diffidence, on account of the impossibility of ascertaining the precise ground on which it was decided ; for as the limitation to the issue, as purchasers, of children born and to be born, would have transgressed the rule against perpetuities, possibly this circumstance may have induced the court to apply the doctrine of *cy pres* ; but to which there seems to be this objection, that it would extend the doctrine (which all agree has already been carried quite far enough) to cases in which an estate in *fee-simple* is given to the issue, in opposition to the rule considered to have been established by the *948] authorities ; besides which, if the court saw a very *decided reason for holding issue to be a word of purchase, why was not the devise restricted to the children, (and the issue of children,) who were born in the lifetime of the testator, as was done (though perhaps unwarrantably) in certain other devises in the same will, under which the ancestor took an equitable interest only, and the issue a legal remainder, which two limitations being of different quality, could not unite by force of the rule in *Shelley's* case ? For these reasons, I have continued to treat the case of *Mogg v. Mogg* as an authority for reading 'issue' as a word of limitation, this being, as I conceive, the least exceptionable ground to which it can be referred ; though it is admitted that in applying this construction to a case in which words of distribution as well as words of limitation were introduced into the devise to the issue, it goes a step beyond any other of the modern cases, and as to this ultra point, therefore, is not to be relied on."

In *Doe d. Blandford v. Applin*, *Doe d. Cock v. Cooper*, and *Ward v. Bevil*, 1 You. & J. 512, where words of distribution were introduced, there was also a devise over ; in which case an estate-tail is given by implication. In *Tate v. Clarke* there was no decision on the point in question ; Lord LANGDALE, M. R., merely holding that the parties before the court were not entitled to the estate ; his opinion upon the point now under discussion, was merely an *obiter dictum*. Upon that case Mr. Jarman observes : (a) "It will be perceived that in this case the devise was to the issue *male and female*, which perhaps (where unaccompanied by expressions showing that the objects were to take concurrently) does not present so decided an inconsistency with an estate-tail, as words of distribution ; since the course of descent under an estate-tail generally does, in point of fact, embrace persons of each sex, *although not in general simultaneously." It may *949] be said on the other side, that if the word "issue" means children, the case falls within the dilemma in *Wild's* case, (b) where a devise to Wild and his wife, and after their decease to their children, (they then having a son and daughter,) was held to give only an estate for life to the parents,

(a) 2 Jarm. Wills, 352.

(b) 6 Co. Rep. 16 b, S. C. *Anon.* Gouldsb. 139, pl. 47 ; S. C. *per nom. Richardson v. Yardley*, Sir F. Moore, 397, pl. 519.

with remainder to their children for life, and no estate-tail; but the object of that decision was to prevent a lapse of the estate.

Byles, Serjt., in reply. It is assumed, in the argument on the other side, that the grandchildren take an estate in fee; so that to support that argument, the word "issue" is treated as a word of limitation, and also as a word of purchase, in the same breath; which it cannot be; *Cook v. Cook*, 2 Vern. 545.(a) It is also said that the plaintiffs must seek to reject the words "as tenants in common" at the end of the clause: but that does not follow; words may be superfluous without any necessity for rejecting them; as if there were a devise to A. and his heirs and their heirs; the latter words would clearly be superfluous. If, in this case, instead of "their issue" the words had been "their children," and the words "as tenants in common" were rejected, the devise would have fallen precisely within *Wild's* case.

Nov. 22. The court having directed a second argument, the case was re-argued before TINDAL, C. J., COLTMAN, MAULE, and ERLE, Js.

Byles, Serjt., for the children of John Harrison, the *testator. [950
The children took an estate-tail. The words "during their respective lives" clearly create no difficulty in adopting this construction of the will. In *Robinson v. Robinson*, 1 Burr. 38, and in *Doe dem. Cock v. Cooper*, 1 East, 229, words of somewhat similar character were held to be superfluous. The other side will mainly rely on the repetition of the words "as tenants in common." It is not necessary to reject these words; since, according to the construction now contended for, they are superfluous: without them, the next generation would equally take as tenants in common. Even if those words be considered repugnant, and not merely superfluous, there is no difficulty in rejecting them, in order to effectuate the intention. In the well known case of *Jesson v. Doe dem. Wright*, 2 Bligh, 1, the words "share and share alike, as tenants in common," were rejected. In *Doe dem. Cock v. Cooper*, words of distribution and division were struck out of the will. That case approaches very near to the present; for there, as here, the word used was "issue." So, in *Doe dem. Atkinson v. Featherstone*, 1 B. & Ad. 944; *Mogg v. Mogg*, 1 Meriv. 654; *Doe dem. Blandford v. Applin*, 4 T. R. 82. *Tate v. Clarke*, 1 Beavan, 100, is a case entitled to particular attention, inasmuch as the will contained no limitation over. There, the devise was to the testator's widow, for life, with remainder to trustees, to pay costs, &c., and to divide the residue of the rents amongst all his brothers and sisters "who should be living at the time of the decease of the testator's wife, and to their issue, male and female, after the respective deceases of his said brothers and sisters, for ever, to be equally divided between and among them. It was held that the words "issue, male and female," were to be construed [951
*as words of limitation, and not of purchase; and that the children

(a) And see *Goodtitle v. Billington*, 2 Dougl. 753; *Marthwaite v. Jenkinson*, 2 B. & C. 357, 3 D. & R. 764; *Mortimer v. West*, Sim. 274.

of a sister who died in the lifetime of the widow, took no interest. The present is a singular case in this respect, that first, there is a devise to a class, and then to their issue as tenants in common. That very circumstance appears to remove the difficulty of putting a construction on the will; for the issue must necessarily take as tenants in common. It can hardly be said that those words are inconsistent with the estate-tail, which, it is contended, the children of the testator take. Expressions apparently far more inconsistent with the intention to create an estate-tail than those which occur in this will have been held compatible with an estate-tail. Thus, in the case of *Denn v. Webb v. Puckey*, 5 T. R. 299, *suprà*, 951, the words, "without impeachment of waste," were just as superfluous as the words in question here. In *Frank v. Stovin*, 3 East, 548, the devise was to B. *for life*, without impeachment of waste, *with power to make a jointure to any future wife*, and, after his decease, then to the use of the issue male of the body of B., lawfully begotten and to be begotten, *and their heirs*, and, in default of such issue, then over. B. had issue, and afterwards suffered a recovery. In the course of the argument Lord ELLENBOROUGH stated, that he was of opinion that the case was governed by *Roe dem. Dodson v. Grew*, 2 Wils. 322, Wilmot, 273, and the court certified accordingly, that B. took an estate-tail. Suppose here the limitation, instead of being to the "issue," had been to the "heirs of the body," as tenants in common, the court could not have entertained any doubt. Unless there be something to control it, the word "issue" is, according to the cases, to be regarded rather as a word of limitation than of purchase. It is clear that neither of the inter-

*952] pretations now submitted to the court *will give full effect to every part of the will: neither side can use the word "issue" in its most general popular sense, as denoting "all descendants." [COLTMAN, J. Not all at the same time: but all in succession may take.] The children would take, and after them the grandchildren. [TINDAL, C. J. According to your construction, the share of each tenant in common in tail would go to his eldest son.] The younger children would not necessarily take; but all might, by possibility, take; whereas, according to the other construction, all could not take. If the former construction be adopted, a great-grandchild would take; whereas, according to that contended for on the other side, he would not take unless born in the testator's lifetime. If "issue" is to be read as a word of purchase, what estate do the children take? Do they take an estate for life? The first difficulty that arises on that construction is, that the testator uses the word "estates," to designate, not the particular estates, but the quantity of interest. [MAULE, J. The term used by the testator is "estates," coupled with the word "situate," which renders it more necessary that the subsequent words should be treated as words of limitation. COLTMAN, J. Both sides leave the fee undisposed of.] If it is to be held that the children only take for life, all the issue born after the death of the testator would be left unprovided for. The consequence of holding that the grandchildren took an estate-tail

would be, to place the fee at the disposition of the first taker; and it would be using the word "issue" both as a word of purchase and a word of limitation, which the law does not allow. *Cook v. Cook*, 2 Vern. 545; *Whitelock v. Heddon*, 1 B. & P. 243. [MAULE, J. It may probably be said, that, though "issue" is a word of purchase, "estates" is a word of limitation.] That might, in some measure, remove that *difficulty; but it would not give an estate-tail to the grandchildren. The court cannot read the word "issue" as meaning grandchildren, to the exclusion of great-grandchildren; for all are equally issue of the children. The word "estate" has been held to be satisfied by an estate-tail. *Whitelock v. Heddon*, 1 B. & P. 243; *Hodges v. Middleton*, 2 Dougl. 431; *Wight v. Leigh*, 15 Ves. 564; *Dunk v. Fenner*, 2 Russ. & M. 567. By applying here the rule in *Shelley's* case, all difficulties will be avoided. [*953]

Channell, Serjt., for the grandchildren. Under this will the children of the testator took an estate for life, with remainder in fee to their children as tenants in common. *Lees v. Mosley*, 1 You. & C. 589, shows that there is a material difference between "issue" and "heirs of the body." The latter being technical words, requiring the strongest words in other parts of the will to warrant a departure from their recognised construction. The word "issue," however, is frequently used in two different senses, as well in statutes as in wills; and the court is therefore at liberty to apply to it that construction which will best answer the general intention of the testator. In the cases in which words like the present have been held to give an estate-tail, there has been either an entire absence of words of limitation over, or a gift over in default of issue; so that, an estate-tail has been held to pass, in order to effectuate the general intention of the testator. In *Lees v. Mosley* the devise was as follows: "I give and devise all that my freehold lease of a farm in Prestbury, &c., unto my two sons Henry-James, and Oswald, in moieties, as tenants in common and not as joint-tenants, in such manner, and subject to such charges, as hereinafter mentioned, that is to say, as to one moiety thereof, *to my son Henry-James, for life, with remainder to his lawful issue and their respective heirs, in such shares and proportions, and subject to such charges, as the said Henry-James shall, by deed or will, appoint; but, in case my son Henry-James shall not marry and have issue who shall attain the age of twenty-one years, then to my son Oswald, in fee. It was held that Henry-James took an estate for life in the moiety, with remainder to his children, as tenants in common, in fee. That decision gets rid of the effect of *Jesson v. Doe dem. Wright*, 2 Bligh. 1, and *Doe dem. Atkinson v. Featherstone*, 1 B. & Ad. 944. In *Greenwood v. Rothwell*, antè, Vol. V. 628, 6 Scott, N. R. 670, this court acted upon the principle laid down in *Lees v. Mosley*. There, the devise was as follows: "I give and devise unto J. G. all my lands, &c., for and during his life, and, after his decease, I give and devise the same unto all and every the issue of the body of the said J. G., share and share alike, as tenants in common, and the heirs of such issue." It was held that J. G. [*954]

took an estate *for life*. In that case, *Tate v. Clarke*, 1 Beavan, 100, where the devise was to the testator's widow for life, with remainder to trustees and their executors, to pay costs, &c., and to divide the residue of the rents amongst all the testator's brothers and sisters who should be living at the time of the decease of his (the testator's) wife, and to their *issue*, male and female, after the respective deceases of his said brothers and sisters, *for ever*, to be equally divided between and among them—was cited, and relied on to show that “issue” was to be construed as a word of limitation and not of purchase: but MAULE, J., observed: “The words ‘for ever’ must refer to all descendants.” Those words are not to be found in this will. No case is to be met with where an *express* devise to one *for life*, and afterwards to his issue, as tenants in common, has been held to give an estate-tail to the first taker, without superadded words of limitation, or a gift over. In *Doe dem. Blandford v. Applin*, there was a gift over. In *Jesson v. Doe dem. Wright*, the devise was to W., for life, and, after his decease, to the *heirs of his body*, in such shares and proportions as W. by deed, &c., should appoint, &c. *Doe dem. Atkinson v. Featherstone*, 1 B. & Ad. 944, is nothing more than a mere repetition of the terms which occurred in *Jesson v. Doe dem. Wright*. In *Whitelock v. Heddon*, 1 B. & P. 243, it was not contended that the words were not sufficient to give an estate-tail according to their ordinary signification, but the question was, as to the effect to be given to the word “estates:” and all that the court decided was, that what it meant depended on the whole context. In *Mogg v. Mogg*, 1 Meriv. 654, there was also a gift over. In *Wilkinson v. Chapman*, 3 Russ. 145, the testator devised a rent-charge, to be issuing out of all his real *estate*, lands, &c., in P., and then he devised his said estate, lands, &c., to M., her heirs and assigns for ever; but, in case she should die under twenty-one, and without lawful issue, then he devised his said *estate*, lands, &c., unto A. during her life; and, after her decease, the testator devised all his said *estate*, lands, &c., to the children of H., as tenants in common: Lord GIFFORD, M. R., held, that, notwithstanding the connection of the word *estate* with locality and words of limitation, it was sufficient to carry a fee to the children of H. Here, in order to give effect to the language used by the testator, it is necessary to hold that the interest the grandchildren are to take, is in respect of the property taken by the children, whether for life or in tail. [TINDAL, C. J. One would rather infer that by “issue” the testator meant by something different from “children,” coming as the words do so closely one after the other. The case would have been much more in your favour if the word children had been repeated.] The case cannot be distinguished from *Greenwood v. Rothwell*. [MAULE, J. It is a question whether the words “as tenants in common,” as used in the second instance, apply to any but grandchildren. The expression “tenants in common” is ordinarily used to exclude joint-tenancy, and not for the purpose of distribution.] According to the argument on the other side, the children could not take as tenants in common. [MAULE, J. Yes: it

is argued that the children would take as tenants in common in tail, and, —as some cases show,—that each child might take in succession.] The question still remains, whether the word “issue” can be read “heirs of the body,” where there is no devise over. [MAULE, J. In the cases you cite of gifts over, the circumstance of there being such gifts over, was relied on to cut down to an estate-tail, that which otherwise would have been a fee.] The only consistent construction of the whole will, is to hold that the children take for life, and the grandchildren in fee.

Byles, Serjt., replied.

The following certificate was sent to the Master of the Rolls:

“First, We are of opinion that the children of the testator took an estate-tail as tenants in common, in the residuary real estate, under the said will:

“Secondly, We are of opinion that the children of the testator’s children did not, nor did either of them, take any estate therein, under the said will.

“N. C. TINDAL.

“T. COLTMAN.

“W. H. MAULE.

“W. ERLE.”

*HODDING v. STURCHFIELD. Nov. 5. [*957

The debt and costs endorsed on a writ of summons, were received by a clerk of the plaintiff’s attorney, after the expiration of the four days:—*Held*, that the attorney not having offered to return the money, was not entitled to go on with the action for the recovery of further costs.

A WRIT of summons, endorsed for 26*l.* 6*s.* 6*d.* debt, and 2*l.* 2*s.* costs, was served on the 7th of June. On the 13th, defendant’s wife paid the debt and costs to a clerk of the plaintiff’s attorney. The amount was retained by the plaintiff’s attorney, who proceeded with the action, on the ground that the payment had not been made until after the four days, and that the clerk had no authority to receive it. A judge at chambers having, on the 26th of June, made an order that all further proceedings be stayed, the debt and costs being paid,

Murphy, Serjt., moved to rescind this order. He cited *Bowdidge v. Slaney*, 2 N. C. 142, 2 Scott, 197, 4 Dowl. P. C. 140, where it was held, that, to entitle a defendant to a stay of proceedings under reg. II. of Hilary term, 2 W. 4, the payment must be made within the four days limited by the rule; and submitted that the defendant ought not to be allowed to take advantage of the clerk’s mistake. [TINDAL, C. J. You should have told the defendant that it was a mistake, and that he might have his money back again.] It is ready for him when he chooses to send for it.

TINDAL, C. J. You should have put the party *in statu quo*. In *Bowdidge v. Slaney*, there was only an *offer* to pay. There is no ground for setting aside the order.

The rest of the court concurring—

Murphy took nothing.

*958]

*EDGEELL v. CURLING. Nov. 20.

A writ of *subpœna* issued in vacation, is void.

CASE for neglecting to attend as a witness, pursuant to a *subpœna duces tecum*, upon the trial of an action in this court, between the present plaintiff and one Tancred and one Spencer.

The defendant pleaded (eighthly) that the said writ of *subpœna duces tecum* was and is in the words following, that is to say, &c.,—setting it out, the teste being—“Witness, Sir Nicolas Conyngham Tindal, Knight, at Westminster, the 6th day of December, in the seventh year of our reign.” The plea concluded as follows:—“And the defendant further says that the said 6th day of December in the seventh year of her majesty’s reign, on which day the said writ was tested, was *in vacation* after Michaelmas term last, and not in term time: wherefore the said writ of *subpœna duces tecum* was and is wholly void in law.” Verification.

General demurrer; and joinder.

The point marked for argument on the part of the plaintiff was—“that the plea affords no answer in law to the declaration of the plaintiff; and that the writ of *subpœna duces tecum*, though issued and tested in vacation, is not null and void, but is of the same force as if such writ had been tested in term-time.”

Channell, Serjt., in support of the demurrer. It may be admitted that, generally speaking, all judicial writs must be tested in term time. The first exception to this rule was introduced by the stat. 2 W. 4, c. 39, s. 12, which enacted that “every writ issued by authority of that act, should bear date on the day on which the same should be issued.” That provision, *959] certainly, *does not, in terms, apply to writs of *subpœna*. By the 3 & 4 W. 4, c. 67, s. 2, after reciting that “by the existing law, and the practice of the courts of common law, actions may be brought, and issues proceed to trial and final judgment, in vacation, notwithstanding the cause of action may have arisen subsequent to the then preceding term, and jury process of [and?] writs of execution are now by law tested in term time only,” it is enacted, that, “from and after the passing of this act, the writ of *venire facias juratores* may be tested on the day on which the same shall be issued, and be made returnable forthwith, and the writ of *distringas juratores*, or *habeas corpora juratorum*, may be tested in term or vacation, on a day subsequent to the teste of the writ of *venire facias juratores*; and all writs of execution may be tested on the day on which the same are issued, and be made returnable immediately after execution thereof: provided always, that when any trial is to be had at bar, the writ of *venire facias juratores* shall be made returnable as heretofore.” The question is, whether the writ of *subpœna* may not be considered as being within the equity of that statute. It frequently happens that causes are not at issue until after

the end of the term ; and great inconvenience may arise if process to compel the attendance of witnesses must be tested in term time, while the jury process and the writ of execution may issue in vacation. It may be doubtful whether this writ is absolutely void,^(a) or only voidable. [TINDAL, C. J. If voidable, at whose election? If at the election of the witness, he has exercised his election by declining to appear.] It is submitted that the writ is only irregular. [MAULE, J. The question is, whether it is a writ which the party was bound to obey.] This is, as was said by Lord MANSFIELD in *Hart v. Weston*, 5 Burr. 2589, “an *odious catching objection, and not to be by any means favoured.” [*960]

Sir T. Wilde, Serjt., contrà,—after he had referred to *Estwick v. Cooke*, 2 Lord Raym. 1557, Fitzgibb. 66 ; *Johnson v. Smith*, 2 Burr. 950, and *Hart v. Weston*, 5 Burr. 2586, to show that a writ issued in vacation which by law ought to issue in term time only, is wholly void,—was stopped by the court.

TINDAL, C. J. A *subpœna* is as much a judicial writ as a *latitat* is ; and it can only be issued while the court is sitting.

ERLE, J. In *Seaton v. Heap*, 5 Dowl. P. C. 247, Mr. Justice LITTLEDALE set aside a writ of *scire facias*, on the ground that it was tested in vacation instead of being tested in term time.

The rest of the court concurred.

Judgment for the defendant.

(a) See *Shirley v. Wright*, 2 Salk. 700.

WARWICK v. BACON. Nov. 6.

[*961]

Service of a rule to compute upon a clerk at the *counting-house* of the defendant, is not sufficient to serve.

GASELEE, Serjt., moved to make absolute a rule to compute principal and interest on a bill of exchange, upon an affidavit of service of the rule nisi upon a clerk of the defendant at his counting-house. The service here is free from the objection taken in *Rowland v. Vizeletelly*, antè, Vol. VI. 723, 7 Scott, N. R. 429, 1 Dowl. & L. 767, where an affidavit alleging service of a rule to compute to be by leaving a copy “with a clerk or servant of the defendants at their warehouse,” was held insufficient, on the ground that it did not sufficiently appear to have been a service upon a person whose duty it was to receive and deliver papers and letters. In this case the service has been on one whose duty it is to attend to all matters of business belonging to his employer.

Per curiam. The usual and proper course is, to serve at the *dwelling-house* of the party, all rules, the service of which is not required to be personal.
Rule discharged.

*962]

*BURGESS v. BEAUMONT. Nov. 20.

To an action for the breach of an agreement to make the plaintiff (who had been governess in the defendant's family) an annual allowance for her maintenance and instruction, until the plaintiff should be required by the defendant to resume her situation, the defendant pleaded, that he entered into the agreement in the belief and on the representation by the plaintiff, that she was an honest and moral person, and a fit and proper person for the situation and employment in the declaration mentioned; and that, before any breach of the agreement, he discovered that the plaintiff had become and was an immoral and dishonest person, and wholly unfit and improper for the situation and employment aforesaid, and a person whom it would have been improper and wrong for him to employ as a governess and teacher of his children.

Held, that the plea was bad, as being too general.

ASSUMPSIT. The first count of the declaration stated, that, before the making of the promise thereafter next mentioned, the plaintiff had been and was a governess and teacher engaged and employed by the defendant, and had resided in the house of the defendant, as such governess and teacher of the defendant's children, and had then quitted such residence and employment, and afterwards, to wit, on, &c., in consideration that the plaintiff, at the special instance and request of the defendant, would, when she should be thereafter required by the defendant, resume the said situation and employment of governess and teacher of his the defendant's children, and would again reside with the defendant and his family as such governess and teacher, and, in the mean time, and until she should be so required as aforesaid, would not contract or enter into any other engagement, without the consent and permission of the defendant, and would take and use due pains and diligence to improve and instruct herself, in various arts, sciences, and accomplishments, and for that purpose would hire, engage, and employ divers masters and professors, he the defendant promised the plaintiff, that, until she should be so required by him to resume the said situation and employment of governess and teacher of his the defendant's children, he the defendant would make and grant to the plaintiff a large, sufficient, and liberal allowance for her maintenance and expenses, and would supply her with sufficient means and money, as well for that purpose, as for hiring, engaging, and paying such masters and professors as aforesaid, and acquiring such accomplishments and knowledge as aforesaid, that is to say, to the amount in the whole of a large sum, to wit, 600*l.* for each and every year from the time of making such promise until she the plaintiff should be so required to resume the said situation and employment as aforesaid:—Averment, that the plaintiff, confiding in the promise of the defendant, was, from the time of the making thereof continually until the commencement of the suit, ready and willing, on being so required as aforesaid, to have resumed the said situation and employment of a governess and teacher of the children of the defendant, and to have gone to reside with the defendant and his family as such governess and teacher; but the defendant did not, during all that time, require her so to do; and that the plaintiff had not during all that time contracted or entered into any other

engagement, and did during all that time take and use due pains and diligence to improve and instruct herself in various arts, &c., and did, at great cost and expense, hire, engage, and employ divers masters and professors to teach and instruct her in such arts, &c., and paid them large sums of money for and in respect of such teaching and instruction: Breach, that the defendant did not nor would make to the plaintiff such allowance as aforesaid, and did not nor would supply her with money for her maintenance and expenses, &c.; and did not nor would pay or allow her the plaintiff the said annuity or sum of money; and at the commencement of the suit, there was due to *the plaintiff, in respect thereof, 2400*l.* for four years [*964 thereof.

To this count the defendant pleaded—sixthly, that he entered into the promise and agreement in that count mentioned, in the belief, and on the representation by the plaintiff, that she was an honest and moral person, and a fit and proper person for the situation and employment in that count mentioned; and that, before any breach of the promise in that count mentioned, to wit, on, &c., he discovered, and the fact was, that the plaintiff had become, and then was, *an immoral and dishonest person*, and wholly unfit and improper for the situation and employment aforesaid, and a person whom it would have been improper and wrong for the defendant to employ as a governess and teacher of his said children, or any of them; wherefore the defendant, on, &c., aforesaid, wholly rescinded (a) the promise and agreement in the first count mentioned, as he lawfully might for the cause in that plea mentioned, and then gave the plaintiff notice thereof—verification.

Special demurrer, assigning for causes,—that the defendant has set forth the charges against the plaintiff in that plea contained, in so general, indefinite, and uncertain a manner, that the plaintiff cannot know what the defendant would attempt to establish by evidence in support of those charges, and therefore cannot be prepared to disprove or answer them; that the defendant has not shown or disclosed, with sufficient or any particularity, any act or acts of immorality or dishonesty committed by the plaintiff, whereby it would appear that the plaintiff was or is an immoral or dishonest person, and improper or unfit to be employed as the governess or teacher of children; that the defendant has not shown *in what respect or how, or as to what kind of immorality or dishonesty, the plaintiff was or is immoral and dishonest; that the plea does not contain any specific or certain, material, and traversable allegation, which the plaintiff can put in issue, &c. Joinder. [*965

To a second count a similar plea was pleaded, which was demurred to on the same grounds.

Talfourd, Serjt., in support of the demurrer. The plea is bad. It has been repeatedly held, that it is not sufficient to make a general charge of

(a) As to the incompetency of one of the parties to an agreement to *rescind* it without the concurrence of the other, see *anté*, 888.

this nature. In order to render the plea good the defendant should have set out the specific acts of immorality or dishonesty on which he relies. In *J. Anson v. Stuart*, 1 T. R. 748, it was ruled that a justification of a charge of swindling must state the particular instances of fraud by which the defendant means to support the charge. ASHHURST, J., there says: "In some few cases, a general charge in an indictment may be sufficient; but those of barratry and keeping a disorderly house, are almost the only instances.

* * * But, where a charge of this kind is preferred, it must be more particular, in order to apprise the other party of it. Now, here, if the defendant can support his charge that the plaintiff has defrauded divers persons, it must be known to him whom he has defrauded, and he must call them as witnesses to prove the particular acts of fraud; if he cannot substantiate his charge, he ought not to have made it." And BULLER, J., says: "The first question here is, whether the defendant is at liberty to charge the plaintiff with swindling, without showing any instances of it. That is contrary to every rule of pleading: for, wherever one person charges another with fraud, he must know the particular instances on which his charge is founded, and therefore ought to disclose them." So, in *Mure v. Kaye*,

*966] 4 Taunt. 34, it was held that a plea justifying an *arrest by a private person, on suspicion of felony, must show the circumstances from which the court may judge whether or not the suspicion was reasonable. And, in *Jones v. Stevens*, 11 Price, 235, it was held that pleas by way of justification, generally aspersing the character of the plaintiff by averments, without stating particular acts of bad conduct as applying to the justification, *ought* to be demurred to, as being due to the court and the judge before whom the action is to be tried. Here, the defendant charges the plaintiff generally with being an immoral and dishonest person without stating any acts from which immorality or dishonesty can be inferred. What is meant by the word "immoral," to which a number of different significations may be given? Is it intended by the term "dishonest," to charge the plaintiff with pecuniary dishonesty? or, is the word dishonest used in the sense of unchastity, in which sense it is used by some of the old dramatists? Again, what is intended by saying that the plaintiff is unfit to be a governess? The agreement itself assumes her to have been, to some extent, unfit: for it provides for her instruction. [MAULE, J. The plea states, that the defendant entered into the agreement on a representation by the plaintiff which is alleged to be false, but it does not state that she knew the representation to be untrue. Suppose a man, on being sued for the price of a horse, were to plead that he bought it on a representation that it was a good hunter, but without alleging that the seller knew it was not a good hunter, and averring no warranty, would that be a good answer?]

Byles, Serjt., *contra*, was called upon by the court to support the plea. The plea is sufficient. In *Young v. Murphy*, 3 Scott, 379, 3 N. C. 54, to an *967] action for a breach of promise *of marriage, the defendant pleaded, first, that, after the making of the promise, the defendant disco-

vered that the plaintiff was an immodest, lewd, unchaste, and immoral person, and being sole and unmarried, had had carnal intercourse with one H. P.; secondly, that after the making of the promise, the defendant had notice that the plaintiff, being so sole and unmarried, had committed fornication with some person or persons to the defendant unknown, and was pregnant with a child likely to be born a bastard, (averring the fact to be so,) of which he had no notice or knowledge at the time of making the promise: and these pleas were held sufficient on special demurrer. The court there said that the rules which govern cases of slander do not apply to cases of immorality. The charges there were nearly as general as the imputations conveyed by this plea. This plea is not so general as it may at first sight appear. The defendant, after stating the plaintiff to be an immoral and dishonest person, proceeds to say in effect, that if he had performed the contract he would have been guilty of a breach of moral duty. [MAULE, J. He does not say it would have been wrong to employ her by reason of her immorality. Suppose she had become blind, that would have been within the allegation.] In cases of warranty, the particular nature and degree of the unsoundness is not stated in the pleadings, but is matter of evidence. There seems no reason why the same rule should not apply here. [TINDAL, C. J. In cases of warranty, you merely deny the warranty in the terms in which it is alleged to have been given.]

TINDAL, C. J. I think this plea a great deal too general. In order to meet the case which might be set up against her, the plaintiff would be compelled to come prepared with witnesses to justify her whole conduct from the day mentioned in the plea, without having any intimation with what particular misconduct the defendant meant to charge her. [*968]

COLTMAN, J. Whether this case falls within the rule which has been laid down as to slander or not, there must be a certain degree of certainty in every plea. This plea is by much too general.

MAULE, J., concurred.

ERLE, J. The plea does not give the plaintiff notice of the charges which she is called upon, and must come prepared, to meet.

Judgment for the plaintiff.

Byles, Serjt., prayed leave to amend, by stating specific charges.

Per curiam. This is not a case in which the defendant is entitled to any favour. Amendment refused.

*969]

*RANNIE v. IRVINE. Nov. 15.

The assignor of a lease and the goodwill of the business of a baker agreed that *he would not, during the term assigned, solicit the custom of, or knowingly supply bread or flour to, any of the customers then dealing at the premises, without the consent of the assignee:—Held not void, as an unreasonable restraint of trade.*

ASSUMPSIT. The declaration stated, that, before and at the time of the making of the agreement thereafter mentioned, the defendant was possessed of a certain house, shop, and premises, with the appurtenances, situate in the county of Middlesex, and called No. 35, Berner's street, for the residue of a certain term of years therein, to wit, a certain term to expire on the 29th of September, 1843, and was there carrying on the trade and business of a baker; that on the 1st of July, 1842, by a certain agreement then made, &c., it was agreed by and between the plaintiff and the defendant, that, in consideration of the sum of 850*l.*, to be paid to the defendant by the plaintiff at the times and in manner thereafter mentioned, the defendant should sell and assign the then remainder of his said term in the said house and shop, to the plaintiff, and should forthwith procure from his, the defendant's landlord, at his own expense, a lease of the said premises for the term of fourteen years from the expiration of the then term; and that the defendant should, for the consideration aforesaid, make and execute an assignment to the plaintiff of the good-will of the baking business then carried on by him as aforesaid upon the said premises, and also of all the fixtures and trade utensils in and about the said premises, then belonging to the defendant; and the plaintiff then agreed to accept such conveyance and assignment on the terms aforesaid; and the defendant then further agreed, for the consideration aforesaid, *that he would not set up or carry on, directly*

*970] *or indirectly, during *the remainder of the then present and the whole of the intended new term, the business of a baker, within one mile of the said premises, under the payment of the sum of 200*l.*, to be sued for and recovered by way of liquidated damages, for each and every month in which the defendant should commit any breach of the last-mentioned agreement; and also that the defendant would not, during the said remainder of the then term, and the whole of the intended new term, solicit the custom of, or knowingly supply bread or flour to any of the customers then dealing at the said premises, No. 35, Berner's street, without the consent in writing of the plaintiff for that purpose first obtained, under the penalty of 200*l.*, to be sued for and recovered as liquidated damages, for each infraction: and that possession of the said premises should be given and taken on, &c. Mutual promises: Averment of performance on the plaintiff's part: that the defendant afterwards, to wit, on the day and year last aforesaid, procured from the landlord of the said premises, to wit, W. J. Roper, a lease of the said premises for the term of 15½ years from the 24th of June, 1842, and then executed an assignment to the plaintiff of the last-mentioned term and interest in the said premises, in lieu of the said assignments of the said residue*

of the said term and of the said new lease in the said agreement mentioned, and the plaintiff then accepted of such assignment in lieu of the said assignments in the said agreement mentioned: Breach, that, after making the said agreement, and after possession of the said premises had been given and taken under the said agreement, and after the assignment of the last-mentioned term, and during the continuance thereof, and during the period in the agreement in that behalf mentioned, to wit, on the 17th of June, 1843, the defendant did knowingly supply bread to one Thompson, being one of the customers before and at the time of the said *agreement dealing [*971 at the said premises No. 35, Berner's street, without the consent in writing or otherwise of the plaintiff, contrary to the said agreement; and did also, after making the said agreement, &c., [stating the supplying of bread to one Brock, another customer:] and that by means of the several premises the defendant had become liable to pay to the plaintiff the several sums of 200*l.* and 200*l.* in the said agreement mentioned, &c.

Special demurrer, assigning for causes, (amongst others,) "that the agreement in the declaration mentioned, for the breaches of which the plaintiff therein complains, is, that the defendant should not knowingly supply bread or flour, as therein mentioned, during the remainder of the then present and the whole of the intended new term, such intended new term being a term of fourteen years to commence from the 29th of September, 1843, and then it is alleged in the declaration, that the defendant, during the continuance of the said then present term, obtained the grant to himself of a new lease from the 24th of June, 1842, which he assigned to the plaintiff, and that, during the continuance of this last-mentioned term, as assigned, he knowingly supplied bread as in the declaration mentioned; but, the term subsisting at the time of the making of the agreement declared on having been merged and extinguished by the grant of a longer term, it is not shown, nor does it appear, in or by the declaration, that the said breaches by the supplying of bread as aforesaid were committed within the term so subsisting at the time of the making of the agreement declared upon, or within the intended new term in the said agreement mentioned, but the contrary does in fact appear and is shown in and by the declaration: and that the said agreement declared on is contrary to public policy, and illegal, in this respect, amongst others, that is to say, that it *restrains the defendant from [*972 supplying bread and flour to particular persons, wherever they may reside, without limit in point of space as to those persons, and under all circumstances, whether such persons change their residences or continue customers of the plaintiff, or not; which is a restraint larger and wider than the protection of the plaintiff can possibly require, and the same must therefore be considered as unreasonable and void in law," &c.

Bytes, Serjt., in support of the demurrer. Admitting the first part of the contract to be good, in which the defendant agrees not to set up the business of a baker within a mile of his former residence, the latter part of the contract is illegal and contrary to public policy, being, to an unnecessary and

unreasonable degree, in restraint of trade. By it, the defendant binds himself during the term, not to solicit the custom of, or knowingly supply bread or flour to, any of the customers then dealing at the premises, without the consent in writing of the plaintiff, under the penalty of 200*l.*, to be recovered as liquidated damages, for each infraction. This is not a restriction, not to deal with certain customers by name, or within a defined locality; which may be good; as in *Hunlocke v. Blacklowe*, 2 Wms. Saund. 156, where the agreement was not to trade with particular customers, *by name*: but it is a contract; generally, not to deal with the customers in whatever part of the kingdom they may reside. In *Ward v. Byrne*, 5 M. & W. 548, the defendant gave a bond to the plaintiff, (a coal-merchant in London,) conditioned (*inter alia*) that the defendant should not, within two years after leaving the plaintiff's service, solicit, or sell to, any customers of the plaintiff; that he should not *follow, or be employed in*, the business of a *973] coal-merchant, for nine months after he should have left the employment of the plaintiff; and that he should not leave his employment without giving a month's notice. The court, on motion to arrest the judgment, held the bond to be void, on the ground that it was a restraint of trade unlimited in point of space. [ERLE, J. Was not the distinction taken in that case between all the world and particular customers?] Here, the restraint is clearly unreasonable. Supposing the customers to remove from the plaintiff's neighbourhood to a small town in the country, where the defendant might be the only baker; under this agreement he would be precluded from supplying them. Further, the breach assigned was not committed during the then present or the intended term; but during the substituted term. The question is, whether "term" is to be read as a period of time or as an estate. It is submitted that "term" denotes the "term of years," the "interest" or "estate," and not time only. [TINDAL, C. J. What was the meaning of the parties? In this agreement term and time are convertible terms.]

Channell, Serjt., *contra*. This contract is not void as being in restraint of trade. In the note to *Hunlocke v. Blacklowe*, 2 Wms. Saund. 156, the rule is thus laid down, that, "though a bond, covenant, or promise, even on good consideration, not to use a trade *anywhere* in England, is void, as being too general a restraint of trade; yet, if such bond, covenant, or promise be, not to use a trade *at a particular place*, it is good: *Prugnell v. Gosse*, All. 56. For the same reason it seems that a bond, covenant, or promise not to use a trade with *particular customers* by name, if founded on a good consideration, is also valid. All the cases on this subject, prior to *974] *Mitchell v. Reynolds*, 1 P. Wms. 181, are noticed in that case.

There, in debt on bond, the defendant prayed oyer of the condition, which recited that whereas the defendant had assigned to the plaintiff a lease of a messuage and bakehouse in L., in the parish of St. A., for the term of five years, if the defendant should not exercise the trade of a baker *within that parish* during the said term, or, in case he did, should, within

three days after proof thereof made, pay to the plaintiff 50*l.*, then the obligation to be void, and pleaded that he was a baker by trade, that he had served an apprenticeship to it, by reason whereof the bond was void in law; wherefore he traded, as he well might; and on demurrer, the court was of opinion, that, a special consideration being set forth in the condition, which shows it was reasonable for the parties to enter into it, the bond was good; and that the true distinction was not between *promises* and *bonds*, but between contracts *with* and *without* consideration; (a) and that, wherever a sufficient consideration appeared to make it a proper and useful contract, and such as could not be set aside without injury to a fair contractor, it ought to be maintained; but with this constant diversity, viz., where the restraint is *general*, not to exercise a trade *throughout the kingdom*, and where it is limited to a *particular place*: that the former is void, being of no benefit to either party, and only oppressive; but the other is good. The principle of this case was afterwards recognised and adopted in *Chesman v. Nainby*, 2 Ld. Raym. 1456, 3 Brown, P. C. 349. *Hitchcock v. Coker*, 6 Ad. & E. 438, 1 N. & P. 796, is conclusive of the present case, in principle, if not in precise terms. There, the plaintiff was a druggist, and had taken the defendant into his service as assistant; and the defendant had agreed that, if he should at any time thereafter exercise the business of a chemist and *druggist in T., or within three miles thereof, he would [975 pay the plaintiff 500*l.* as liquidated damages. It was held in the Exchequer Chamber that there was a legal consideration for the contract—that the court could not enter into the question whether the consideration was equal in value to the restraint agreed to by the defendant—and that the restraint was not shown to be unreasonable or oppressive, by the circumstance that its duration was not limited to the life of the plaintiff, or to the time during which he should carry on the business. Here, the restraint is not larger than was necessary, as was the case in *Mallan v. May*, 11 M. & W. 653, and only carries out what clearly must have been the intention and calculation of the parties; neither is it of such an extensive nature as the restraint in *Proctor v. Sargent*, 2 Mann. & Gr. 20, 2 Scott, N. R. 289, which this court held to be free from objection. It is true that here the customers are not referred to *by name*, as in *Hunlocke v. Blacklowe*: but the restriction is confined to customers then dealing at the premises, and there was no occasion to particularize them. In calculating the price to be paid for the goodwill, reference must of necessity have been had to the number of persons who dealt at the shop. The plaintiff agreed to be content with the limit of one mile from the premises upon the defendant undertaking not to serve his former customers. [TINDAL, C. J. Suppose the customers to remove to a distant part of London? The restraint would remain, although the necessity for it would cease.] The same objection might be taken where the customers are named, as in *Hunlocke v. Blacklowe*. *Gale v. Reed*, 8 East, 80, is in point. *Ward v. Byrne* is clearly distinguishable

(a) Vide *infra*, 979 (a).

from the present case. Here, the defendant has power to set up trade any-
 *976] where beyond the *limit of a mile from his former premises, upon
 the restriction that he shall not supply any of his old customers,
 which is no more than is reasonable and necessary for the protection of the
 plaintiff.

Byles, Serjt., replied.

TINDAL, C. J. Upon the best construction I can put upon this agree-
 ment, it does not appear to me to be such a contract in restraint of trade as
 to compel us to hold it void. The first part of the agreement—that the de-
 fendant would not directly or indirectly set up or carry on during the term
 the business of a baker, within one mile of the premises disposed of—is
 admitted to be good. But it is contended that the latter branch of the
 agreement, whereby the defendant engages “that he will not, during the
 said term, solicit the custom of, or knowingly supply bread or flour to, any
 of the customers then dealing at the said premises, without the consent in
 writing of the plaintiff,” is such a restriction upon the defendant’s right to
 trade as renders the agreement void as being contrary to public policy. In
 the first place, it is to be observed that this is not a general restraint of trade,
 but only restricts the defendant from trading with a very limited number of
 persons whose names were well known to him at the time he entered into
 the contract; and it would not carry the case further than the first part of
 the agreement, provided the customers continued to reside in the same
 place. But, it is argued that the customers may remove into another dis-
 trict, and that this contract would prevent the defendant from supplying
 them with bread and flour whithersoever they might go, although they might
 not be able to obtain so necessary an article as bread from any one else. If,
 however, the contract is a reasonable one at the time it is entered into, we
 *977] are *not bound to look out for improbable and extravagant contin-
 gencies in order to make it void. It does not seem to me, that, in
 holding this contract to be good, we shall be at all extending the doctrine
 laid down in the note to *Hunlocke v. Blacklove*, 2 Wms. Saund. 156. Un-
 doubtedly, in that case, (where the point was not taken, probably because
 the very learned person by whom it was argued did not think it tenable,)
 the customers were named in a schedule. That makes no substantial dif-
 ference; for here, the names of the customers would all appear in the de-
 fendant’s book, and the restraint was virtually limited to a given number of
 persons ascertained and agreed upon by the parties at the time. I therefore
 think our judgment must be for the plaintiff.

COLTMAN, J. I entirely agree that restrictions of this nature ought not to
 be extended beyond what is necessary for the fair and reasonable protection
 of the vendee. In the present case, I think it is only reasonable that the
 vendor should be restrained from dealing with his old customers. It is
 true, remote and improbable cases may be put, in which inconvenience
 might result from such a contract; but we ought not to indulge in such
 suppositions, but rather confine ourselves to looking at what is likely to

occur. *Hunlocke v. Blacklowe* was open to the same objection ; but neither the court nor the learned person who there argued for the defendant, suggested that the contract was void as being in restraint of trade. And the same view is adopted by Mr. Serjeant *Williams*.

MAULE, J. The general rule against covenants in restraint of trade is founded upon this, that the law favours trade for the sake of the public, and not for the sake of the parties engaged in it. And the reason of *the exception engrafted upon that rule, is, that the exception is [978 in furtherance of the rule itself. If it were held that a party selling the goodwill of a business could not restrain himself from using for his own profit that which he has agreed to sell, that would operate as a restraint of a very injurious kind. But it is objected here that the restraint goes beyond the limit allowed by the law, and what is necessary for the effectual security of the vendee. The provision is, that the defendant shall not, during the term, solicit the custom of, or knowingly supply bread or flour to, any of the customers then dealing at the premises, without the consent, in writing, of the plaintiff. That must receive a reasonable construction. For instance, it cannot be held to apply to a dealing in any other trade than that of a baker ; nor do I think that the giving bread to an old customer in the way of charity would be an infraction of the contract : and yet both of these cases would fall within the literal construction of the contract. If, then, we are to give it a reasonable construction, such construction would probably exclude the case that has been put, of this baker, and some of his old customers going to some distant spot where bread would be procurable only from him. The possibility that some such extravagant case may occur, will not make a restriction unreasonable that is otherwise reasonable and just.

ERLE, J. I also am of opinion that this contract is valid. In the case of the sale of the goodwill of a trade, nothing is more reasonable than that the assignor shall be restrained from getting back any of the customers he has assigned. That I take to have been the intention of the parties in the present case. Extreme cases may be suggested, in which inconvenience might result from such a contract : but so far as principle is concerned, I think the plaintiff is entitled to our judgment. *It is true that the [979 point was not raised in *Hunlocke v. Blacklowe* ; but there can be little doubt that the attention of the court would have been called to it, if the counsel for the defendant had felt it to be tenable. In *Ward v. Byrne*, the party was restrained in the most ample manner ; and it is remarkable, that during the discussion which that case underwent, this objection was never made. It appears, therefore, that in both of these cases it was passed by as untenable.

Judgment for the plaintiff.

Byles, Serjt., applied to amend, by withdrawing the demurrer, and pleading to the action. He submitted, that this indulgence was only

reasonable, seeing that the point had never been distinctly determined before.

Channell, Serjt., contra. The defendant, if allowed to amend, should undertake not to bring error.

TINDAL, C. J. Giving such an undertaking, and pleading issuably, he may amend, on payment of costs. Rule accordingly. (a)

(a) Some confusion appears to arise in cases of this description from the use of the term "consideration." As between the assignor or assignee of a trade or business, any consideration which would support a promise would be sufficient; and, in case of an assignment by deed, the solemnity of sealing and delivery would be a sufficient consideration; but as an injury is *prima facie* done to the public by a contract whereby one of the parties is restrained from trading, such a contract is void, unless something appears which shows that the restraint is required for the reasonable protection of the vendee; thereby preventing the greater injury which would result to the public if parties could not, with safety to a purchaser, transfer their interests in any particular trade or business.

*980] *DOE dem. MORGAN, WILLIAMS and WAYNE v. POWELL. Nov. 16.

By a memorandum made on the 2d of February, A. agreed to let and grant a lease to B. of "the coal, iron-mine, stone, and fire-clay," under certain lands, at certain specified royalties, for the term of seventy years; and it was provided that so much royalties as would amount to 50*l.* a year, should be worked or paid for during the term; the rent to commence in a year from the time a pit was sunk; with power to work the minerals, and to deposit rubbish, and make a wharf, as usually granted in leases of a similar nature, and as granted by C.; and to abandon and quit the same, if at any time during the term B. should think fit, on giving six months' notice; to commence sinking a pit before the 24th of June; and A. engaged that he had not encumbered such estate; to contain the usual covenants, and as entered into by C., and A. engaged to sign a lease upon the said terms as soon as it could be prepared:—*Held*, that this was not a lease, but an agreement for a demise *in futuro*.

Whether an instrument is to operate as a lease or an agreement, depends upon the intention, to be collected from the instrument, and from the nature and condition of the subject-matter, without reference to extrinsic circumstances or subsequent acts. (u)

EJECTMENT, for coal-mines and iron-mines at Aberdare, in the county of Glamorgan.

At the trial, before MAULE, J., at the last spring assizes for the county of Glamorgan, the following facts appeared.

The defendant was in possession of the mines by conveyance from Morgan T. David, under whom the lessors of the plaintiff also claimed, relying upon an instrument,—signed by the respective parties thereto, but not under seal,—of which the following is a copy:—

"February 2d, 1838. Morgan T. David hereby agrees to let, and grant a lease, to George R. Morgan, Edward M. Williams, and Thomas Wayne, the coal, iron-mine, stone, and fire-clay under Abernant y Gros y Shaf and Tyr Bach, with all the mines belonging to him in the parish of Aberdare, thereunder, at the following rate per ton, viz. 9*d.* per ton, for every ton of

*981] coal, customary weights for shipping purposes, as usually let in the county of Monmouth; 1*s.* per ton, for mine, the usual weight in

the parish of Aberdare; and for clay and stone, the same that William T. David is paid for, as well as the coal and mine, for the term of 70 years from this 2d day of February; and that so much royalties as will amount to 50*l.* a year, be worked, or paid for, during the term, *which rent is to commence in a year from the time the pit is sunk through the four-foot coal*; with power to work the said minerals, and to deposit rubbish, and make a wharf, as is usually granted in leases of a similar nature, and by William T. David: Nevertheless, if at any time during the term the said George R. Morgan, E. M. Williams, and Thomas Wayne, should think fit, from the quality of coal being unsound, or from faults, on giving six months' notice, to abandon and quit the same as if this agreement had never been entered into. And *we hereby bind ourselves to commence sinking a pit before the 24th of June next.* And the said Morgan T. David engages that he has not encumbered the said estate, to prevent him entering into a lease on the above terms and agreement; *which lease is to contain the usual covenants, and as entered into by his brother.*

“The said Morgan T. David to be allowed 1*d.* per ton for all minerals brought from other properties through the pits on his land. And the said Morgan T. David engages to sign a lease upon the said terms, as soon as it can be prepared.”

Shortly after the execution of the instrument, the lessors of the plaintiff commenced sinking a shaft. No rent had been paid.

For the defendant, it was contended that this instrument was a mere agreement to execute a lease *in futuro*.

For the plaintiff, that it amounted to an actual present demise; and the lessors of the plaintiff put in a letter from Morgan T. David, in which he so treated it.

The learned judge held that the instrument so signed *was only an agreement; and directed a nonsuit, reserving leave to the plaintiff to move to enter a verdict. [*982]

Sir T. Wilde, Serjt., in Easter term last, (April 17,) moved accordingly, referring to Bacon's Abridgment, *Leases and Terms for Years*, (K.); *Poole v. Bentley*, 12 East, 168; *Pinero v. Judson*, 6 Bingh. 206, 3 M. & P. 497; *Bicknell v. Hood*, 5 M. & W. 104; *Doe v. Benjamin*, 9 A. & E. 644, 1 P. & D. 440, Woodf. L. & T., ed. 1843. He suggested that the facts should be stated in a special case. A rule nisi being granted, and the suggestion not being adopted.

Talfourd, Serjt., (with whom was *Byles*, Serjt.,) now showed cause. The question is, what was the intention of the parties, as declared by the written instrument, regard being had to the nature and condition of the subject-matter; *Perring v. Brook*, 1 Mood. & Rob. 510. The insertion of a clause providing for the execution of a formal lease, will not prevent an instrument from operating as an actual demise, where it is contemplated that the parties shall have immediate possession. But, though there are words of present demise, yet if, on the face of the instrument, the intent of

the parties appears to be that the possession shall not pass until a lease has been executed, it will operate only as an agreement: *Morgan d. Dowding v. Bissett*, 3 Taunt. 65. In that case, as in the present, the instrument contained matters which could only be carried into effect by a lease to be executed at a subsequent period. In this case the document of the 23d of February, 1838, amounted only to an engagement to grant and accept a lease, carrying out, and reducing to a certainty the views of the parties. Agreements relating to mining property have never been held to operate as present demises. The point arose in *Jones v. *Reynolds*, 1 Q. B. *983] 506. The correspondence in that case ascertained the terms of the holding with much greater precision than the instrument now before the court, which was evidently intended as the basis of a lease by which the terms of the tenancy are to be fixed. It is to be a demise, not of the surface, but of the minerals only, or a grant of a license to work them. [TINDAL, C. J. A demise of the minerals before they are dug is a demise of the realty: the whole coal, iron-mine, stone, and fire-clay are expressly mentioned as the subject of the demise.] There is no stipulation as to the possession, except that the lessees bind themselves to commence sinking a pit before the 24th of June: no rent is to become payable until a year after the pit is sunk through the four-foot coal, which may never happen: there is no engagement that the mines should be effectually worked: and no stipulation as to the place where or the mode in which the rubbish should be deposited and the wharf made. [MAULE, J. An interest in incorporeal hereditaments is to pass. ERLE, J. Which can only be by deed; *Bird v. Higginson*, 2 Ad. & E. 696, 4 N. & M. 505.] The lease is to contain the usual covenants. In the mining districts in Staffordshire and Monmouthshire, leases containing covenants of the most special description, are usual,—providing for rights of entry on the surface of the land, compensation for surface damage, and the restoration of the land to its original state at the end of the term, and the like. The royalty does not appear to be described with sufficient certainty to be made the subject of a distress. Does the expression “for clay and stone, the same that William T. David is paid for,” mean that paid for at the present moment, or during the last year of the term? Every circumstance which has been held to show a con- *984] tract not to amount to a present demise, is to be found *here. It would be difficult, in any case, to find stronger reasons for holding this to be merely an agreement for a future lease.

Sir T. Wilde, Serjt., (with whom were Channell, Serjt., and E. V. Williams.) Any instrument which gives a right of possession is a lease. It is not material that the terms of the instrument are uncertain with reference to particular objects. It should be looked at with reference to the general intent. Whether this instrument is to operate as a lease or as an agreement, the term is to commence from the date of the instrument. It is to be a term of seventy years “from this second day of February.” The precise time is fixed for the lessees to commence their operations. Power is given

to the lessees to determine the whole interest. That power, it is submitted, might be exercised before the more formal lease was executed. It is exercisable at any time during the term. The intention of the parties is to be looked at without regard to technical expressions. It seems to be inferred that the parties did not know what the custom of mining was: but the document leads to the opposite conclusion. It frequently happens that a man intending to create an under-lease, executes an instrument which is construed to enure as an assignment.^(a) The courts have held, "let" and "agree to let," to be equivalent terms. If a lease were now granted it must commence at the same time as mentioned in this instrument. It may be admitted that a future lease was contemplated. The point relied on by the defendant—that the intention of the parties must govern the construction of the *instrument—is in the plaintiff's favour. Whether the [985 lessees are entitled to a covenant or grant, to enable them to do acts necessary for the proper working of the mines, may be doubtful; but, in this case, that point is not material; if a lease were now to be granted, it would be as uncertain as the agreement already in force, if extrinsic circumstances are to be taken into consideration. The lessor came backwards and forwards, and saw what the lessees were doing.

The words, "as soon as it can be prepared," point to no specific time. A notice not to use the property until a lease should have been granted, would have been null and void. It is the practice to admit the statements of the parties as to the sense in which they executed an instrument. If this instrument is so construed that an interest could not pass, it will have an effect totally different from the intention of the parties. The lessor did not mean to grant a license to work the mines, but to create an actual demise. [MAULE, J. "All the mines belonging to him thereunder," could hardly be meant to refer to mines already open.] If possible, effect is to be given to all the words which are used. It is said that whatever words are sufficient to explain the intent of the parties—that the one shall divest himself of the possession, and the other come into it for a determinate time—such words, whether they run in the form of a license, covenant, or agreement, are of themselves sufficient, and will, in construction of law, amount to a lease for years, as effectually as if the most proper and pertinent words had been made use of for that purpose.^(b) So, in *Poole v. Bentley*, 12 East, 168 b, 2 Campb. 286; *Doe d. Walker v. Grooves*, 15 East, 244; *Doe d. Phillip v. Benjamin*, 9 A. & E. 644, 1 P. & D. 440; *Doe d. Pearson v. Ries*, 8 Bingh. 178, 1 Mo. & Scott, 259; *Doe d. *Jackson v. Ashburner*, 5 T. R. 168; *Barry v. Nugent*, Ibid. 165, n. *Morgan v. Bissell* is relied on by the other side for a dictum of MANSFIELD, C. J., that [986

(a) A lessee who sub-demises for a term commensurate with his own, has, by an ingenious application of the principle of the statute of *quia emptores*, to chattel interests, or by an assumption that the principle existed at common law, been considered, upon the authority of an incorrect abridgment of an *obiter dictum* by Finchden, C. J., as assigning his whole term, his intention really being to create a derivative interest under it. Vide 5 Mann. & Ryl. 158.

(b) Bac. Abr. title *Leases*, (K).

an agreement to give a future lease will make the instrument operate as an agreement only; but that is not an authority now. *Jones v. Reynolds*, which was also referred to, appears to have been a very clear case, but it contains nothing which throws any light upon the question now before the court. Mr. J. PATTESON relies upon circumstances which are wanting here. There may have been grounds for deferring the execution of a former lease in this case, though it may have been fully understood that an immediate interest was to pass. It is sufficient if the court can see that it was the intention of the parties that an interest should pass, which would amount to a lease.

Channell, Serjt., on the same side. In *Jones v. Reynolds* it was held, that where by an instrument not under seal, a party agreed to take land for the purpose of digging and working ore, under which instrument he took possession, that he was liable to an action for use and occupation. The defendant contended that the instrument operated merely as a license, but the court of Queen's Bench refused a rule to enter a nonsuit, for which leave had been reserved. There the objection was, that the instrument enured as a license; here it is urged, that there is an apparent intention to grant and to accept a future lease; but the taking of possession ought to have the same effect in the present case as in *Jones v. Reynolds*. Some legal interest should pass, but that which shows an intention to pass a legal interest in the subject-matter, constitutes the instrument in which it is contained, a lease to that extent. [ERLE, J. Might there not be an agreement *987] for a lease, and in the mean time a tenancy at *sufferance? (a)] Such a tenancy arises from the act of the tenant in taking possession.

It is for the interest of the lessor and of the lessee, that this instrument should be construed as a demise. It is for the interest of the lessor to have a permanent term. If this instrument be construed as an agreement only, then if the lease should not be executed till the sixty-ninth year, the lessee, who had bargained for a term of seventy years, would have a legal term to the extent of one year only. The lessee, therefore, would be interested in

(a) "There is a great diversity between a tenant at will and a tenant at sufferance; for tenant at will is always by right, and tenant at sufferance entereth by a lawful lease, and holdeth over by wrong. A tenant at sufferance is he that at the first came in by lawful demise, and after his estate ended continueth in possession, and wrongfully holdeth over." Co. Litt. 57 b. But a rightful tenant at will is said to hold by the permission and sufferance of the lessor, and may, in a certain sense, be called a *tenant at sufferance*.

It seems questionable whether ejectment can be maintained by a tenant at will, inasmuch as by the demise, which, as between the parties to the consent-rule, must be considered as a real transaction, the will would be determined. Defendants in ejectment are allowed to set up title in a stranger for the purpose of protecting their possession; and ejectment cannot be maintained on the demise of persons whose title is shown to be founded in wrong—as tenants at sufferance, or as disseisors, abators, intruders, or other deforcianta. But in the absence of proof of the tortious nature of the title of the lessor, the bare fact of possession in the lessor (or in the lessee, if he be a real person, and as such capable of being shown to have been in possession,) for however short a period, will be sufficient to support an ejectment, and would indeed have been sufficient to support a writ of right. Vide 10 E. 4, (or rather 49 H. 6, the case having occurred during the short period of the *recaption*, as it was called, of regal power by Henry the Sixth,) fo. 18, pl. 22; Bro. Abr. tit. *Pleadings*, pl. 99; *Allen v. Rivington*, 2 Saund. 111, and note to that case in 6th ed. of Wms. Saund., 2 Mann. & Ry. 112 (a).

treating this as a legal demise, and not as a mere equitable interest. The lessor also would have an interest in treating this as a lease. The rent is to be paid during the term, and is to commence in a year from the time a pit is sunk through the four-foot coal. This extends *to both the sleeping rent and the royalty rent. By holding this to be an agreement only, the right to recover the rent would be postponed. [MAULE, J. What interest do you contend passed?] The interest or right to commence operations, an interest of great importance to the parties. There is another ground for supporting this as a lease. In *Morgan v. Bissell*, Sir J. MANSFIELD, C. J., says, "I have known parties long hung up at an inquiry before a master in chancery, what are the usual covenants?" So here, it would be attended with great inconvenience to the parties if the right should be suspended until all the questions which might be raised upon the instrument were finally settled. [*988]

TINDAL, C. J. The question in this case is, whether the instrument produced in evidence on the part of the plaintiff, operated as a lease, or was merely an agreement for a lease to be executed; and upon the best consideration I can give, the latter appears to me to be the proper legal construction, and to be that contemplated by the parties. From the case of *Doe d. Jackson v. Ashburner*, 5 T. R. 163, downwards, it has been held, that the intention of the parties, as appearing upon the face of the instrument, in connection with the surrounding circumstances, must govern its construction; but further or wider than that I am not prepared to say that we have any right to go. Now, in order to ascertain the intention, it is important to consider whether possession was given by the instrument, and whether it contains words of present demise.

The words are—"Morgan T. David hereby agrees, for himself, &c., to let and grant a lease to Messrs. George R. Morgan, Edward M. Williams, and Thomas Wayne, the coal, iron-mine, and fire-clay," &c. It *may be conceded that the words "I agree to let" do not make the instrument an agreement only, provided the rest of the words show an intention to create an actual demise: but they throw a doubt upon the intention, and when we find them coupled with the words "and grant a lease," they rather seem to indicate that an intention to execute a future lease predominated, and at least leave the matter in doubt and uncertainty. Towards the end of the instrument, the parties come back again to the use of words of agreement. The tenants say—"We hereby bind ourselves to commence sinking a pit before the 24th of June next: and the said Morgan T. David engages that he has not encumbered the said estate, to prevent him entering into a lease on the above terms and agreement." Now, it is very important, before a party proceeds to invest property in a mine, to see that the proposed lessor has the power to grant the lease, that he has not encumbered the estate, or so dealt with it as to render the lessee liable to be disturbed by one having title paramount. Again, the lease is to contain "the usual covenants," and such as are "entered into by the lessor's brother." Some preliminary proceedings were therefore contemplated; a [*989]

consultation with some attorney would be necessary to enable the parties to know what were the usual covenants, and some inquiry as to what were the covenants entered into by the lessor's brother. This tends to show the predominant intention of the parties to have been that a future lease should be executed. The clause at the end—"And the said Morgan T. David engages to sign a lease upon the said terms as soon as it can be prepared;" shows plainly that the execution of a more formal lease at some future period was contemplated. According to *Poole v. Bentley*, 2 Campb. 286,

*990] 12 East, 168, to constitute a lease, it is necessary "that it should appear that the parties contemplated the creation of a present interest (a) in the subject-matter. Here, there was no previous possession, and no possession is stipulated for. It is quite uncertain when the actual occupation was to begin, but it seems to have been considered that sufficient opportunity was left for preparing a formal lease, there being no immediate possession, or any agreement for immediate possession: the second test suggested in many of the cases, therefore, fails. Another point is that which arose in *Morgan v. Bissell*, where it is said that strong circumstances of inconvenience appearing on the instrument, if it should be construed as a lease, indicate the intention of the parties that it should operate as an agreement only. Are there here circumstances of inconvenience attending the construction of this instrument as a present demise? When is the rent to commence? It is left quite *in ambiguo*. No part of the surface is here demised, and no way of getting at the coal is alleged to have been demised. A grant of an easement *in alieno solo*, being an incorporeal hereditament, can only be by deed. *Bird v. Higginson*, 2 A. & E. 696, 4 N. & M. 505. Without an instrument under seal, the tenants would not be entitled to exercise rights absolutely necessary for the enjoyment of the subject-matter of the demise. (b)

*991] *COLTMAN, J. The question which we have to determine in the present case is, whether it was the intention of the parties that the interest in a term of seventy years in the minerals should pass, by the instrument signed on the 19th of February, or whether its object was not merely to settle certain terms which should form the bases of a future lease. In determining questions of this nature great difficulties often arise; and great difficulty exists in the present case, where we find nothing in express terms to determine what was the predominant intention of the parties. If there had been any proviso for immediate possession, I should have thought it would have gone far to determine the case. If I could see an intention to give possession immediately, I should say that this circumstance added to

(a) i. e. a present *interesse termini*,—in other words a presently vested right to enter and take possession, either immediately or at a future period, as the *habendum* may be.

(b) But things lying in grant may pass as *incident* to that which lies in livery. A. seized of Whiteacre and Blackacre, with no access to Whiteacre but over Blackacre, demises Whiteacre to B. *by parol*: B. has a way over Blackacre, as incident to the demise, or, as it is called, as a way of necessity. So, by a sale of growing timber, a right of ingress and egress over the land passes. The vendee of fish in a pond cannot cut down the banks of the pond,—not because he has no deed, but because the fish may be taken in nets. *Fitz. Abr. tit. Rurre*, pl. 237.

the other matters, would induce me to hold the instrument to be a lease. But the only stipulation bearing on the possession is, that the lessors of the plaintiff shall commence sinking a pit at some indefinite period before the 14th of June. Another test has been suggested—the convenience of the parties: and my brother *Channell* contends that it was for the interest of both parties, and particularly for the interest of the landlord, that the instrument should enure as a lease. I cannot think that it would be for the interest of the landlord to allow possession to be taken under such an instrument. The rent is not to commence until the expiration of a year from the sinking of the pit through the four-foot coal. When that is to be done, is altogether undefined: there is nothing to compel the lessees to cut through the four-foot coal, and it might be to the interest of the grantees never to do so; and so no rent would become payable at all. It is often worth while to take a lease in order to keep coal out of the market. It is difficult to conceive how any person who contemplated an engagement for seventy years could enter into so blind a bargain.

*MAULE, J. I also think that the rule should be discharged. The question is, whether the instrument given in evidence amounts to a present demise, or is to be carried into effect by a writing under seal; (a) and that question, as was properly admitted by my brother *Channell*, is to be determined by the intention of the parties. Looking at the terms of the instrument, and the nature of the property, we have to say whether it was intended by these parties that an interest in land should pass by that instrument. Whatever doubt may exist in other cases, I think we have here abundant materials to remove all doubt. It is admitted that the intention of the parties could not be completely carried into effect without an instrument under seal. The easement of depositing rubbish on the surface in sinking the pit, and of breaking into the soil, and of making a wharf, which forms a very material part of the contract, could not pass by this unsealed instrument, inasmuch as it is a thing that lies in grant. My brother *Channell* says, that although such easements would not pass because they lie in grant, the parties may have not considered what lie in grant and what did not. I think it very likely that none of these parties knew what does or does not lie in livery. But I think also that the parties supposed that their object could not have been effected without a regular lease. They would therefore come to the same conclusion, as the most skilful conveyancer would have done. [*992]

It has been contended by my brother *Wilde*, that the subsequent conduct of the parties may be looked at to ascertain their intention at the time of contracting; for *which he cites a dictum of my Lord Chief Justice in *Doe dem. Pierson v. Ries*, 8 Bingh. 178, 1 M. & Scott, 259. [*993]

(a) Under the 7 & 8 Vict. c. 76, all leases of land in writing were to be by deed. That statute was repealed by the 8 & 9 Vict. c. 106, which requires a deed only where a lease is required by law, to be in writing. Leases of things lying in livery for less than three years, were not required by law to be in writing, and leases of things lying in grant could only be by deed.

The question there was, whether the instrument had reference to the demise of a house which was out of repair, and which it was necessary that the tenant should take possession of, for the purpose of doing the repairs, for some time before such possession could be beneficial. That case turned upon the state of the property at the time, and it proves nothing as to the admissibility of collateral acts of the parties for the purpose of ascertaining what had been their intention at the time of contracting. Here, if the parties had at any time afterwards said what estate they took under this instrument, their statements would have been evidence against themselves. The instrument contains a provision for beginning to work before the 24th day of June, 1838. The rent is not to commence before twelve months after a pit is sunk through the four-foot coal. The lease would point out when the lessees were to get through the four-foot coal, and thereby fix the period for the commencement of the rent. I entertain not the smallest doubt that the instrument was intended as an agreement for a future lease.

ERLE, J. I also am of opinion that this instrument is an agreement only, and does not amount to a lease. It is to be construed with reference to the apparent intention of the parties and the nature and to the state of the subject-matter. Mineral property requires a most definite statement of the rights of the parties. If this instrument was to operate as a lease, all parties would be material sufferers. The lessees are not bound to work through the four-foot coal; and therefore no certain rent is reserved: on the other hand, the lessees would have no means of access.^(a) In mining *994] property it is *necessary to have power to deposit rubbish. Under this instrument the lessees would have no right to that easement. It appears by no means clear that if a lease had been tendered to the lessor for execution in the form contained in this instrument, he would have been bound to execute it. And on the other hand, if there were no title in the lessor, the lessees would not, I think, be bound to accept a lease.

Rule discharged.

(a) *Sed vide supra*, p. 990, note (c).

BECKETT v. BRADLEY. Nov. 15.

A. by indenture demised to B., for ten years, the dividends to be declared on certain railway shares, at a certain yearly rent, payable half-yearly. In covenant by A., against B., upon this deed, the declaration alleged that A. was a member of the company, "and as such was possessed of or entitled to certain shares therein, &c. : the declaration then set out the indenture, and alleged a breach of a covenant to pay the rent. B. pleaded "that A., at the time of the making of the indenture, was not possessed of, or entitled to, the said shares," &c. :—Held, that B. was estopped by his deed from so pleading; and that A. might take advantage of the estoppel, upon demurrer.

COVENANT. The declaration stated, that, at the time of the making of the deed thereafter mentioned, the plaintiff was a member of the North-Midland-Railway Company, and, as such, was possessed of, or entitled to,

certain shares therein, to wit, shares equivalent to twenty shares of 100*l.* in amount, with the dividends payable thereupon half-yearly, or otherwise when and as the same should be thereafter declared, and made, by the company; and that before the commencement of the suit, to wit, on the 20th of November, 1841, by a certain indenture, bearing date the day and year aforesaid, and made between the plaintiff and the defendant, it was recited, that the plaintiff, at the time of the making of these, was a member of the North-Midland-Railway Company, and, as such, was possessed of, or entitled to, certain shares therein, equivalent to twenty *shares of 100*l.* each [*995 in amount, with the dividends payable thereupon half-yearly, or otherwise when and as the same should be thereafter declared, and made, by the company; that it was therein also recited that the plaintiff had agreed to demise to the defendant, for the term of ten years, from the 1st of July then last past, the dividends to be declared and made upon the said shares within the said term, after the day of the date of the said deed, at the yearly rent of 100*l.*, payable half-yearly, and under and subject to the proviso, covenants, stipulations, and agreements thereafter contained; and in pursuance and performance of the said agreements, and for carrying the same into effect, and also in consideration of the yearly rent, covenants, and agreements thereafter reserved and contained, and by the defendant, his executors, &c., to be paid, &c., the plaintiff did by the said deed demise and set, unto the defendant, all such dividends as should, from and after the date and execution of the deed, during the said term of ten years arise, accrue, be made, declared, or grow due or payable, half-yearly or otherwise, from, upon, or in respect of twenty shares of 100*l.* each in amount, in the said undertaking or concern of the North-Midland-Railway Company, including the dividends (if any) which should be made or declared in respect of the said shares for the half-year ending the 1st of July, 1851, although such dividend might not be actually made or declared before the month of August following; and all the power and authority of the plaintiff to demand, recover, and receive, and give effectual acquittances, releases, and discharges for the same dividends, and every or any of them: *Habendum* unto the defendant, his executors, &c., for the term of ten years, to be computed from the 1st of July then last past, yielding and paying therefore, during the said term, unto the plaintiff, her executors, &c., the yearly rent of 100*l.* by *two equal half-yearly payments, on the 12th of [*996 February and the 12th of August in each year, without any deduction, &c.—the first half-yearly payment thereof to be made on the 12th of February then next ensuing. [Covenant for payment of rent; and proviso for re-entry for non-payment.] Breach—that, after the making of the deed, and during the term, and before the commencement of the suit, to wit, on the 12th of August, 1842, a large sum of money, to wit, 50*l.* of the moneys by the deed made payable to the plaintiff as aforesaid, for one half-year of the said term, ending on the day and year last aforesaid, became and was due and owing from the defendant to the plaintiff; and,

although certain dividends on the said shares, amounting to 20*l.*, being the whole amount then due and payable in respect thereof, were afterwards, and more than thirty days after the said sum of 50*l.* so became due and payable as aforesaid, and before the breach of covenant thereafter next mentioned, to wit, on the 15th of September, 1842, taken and accepted by the plaintiff in payment and satisfaction of the like sum of 20*l.*, parcel of the said sum of 50*l.*, and the amount of such dividends so taken and accepted as aforesaid was then credited by the plaintiff in account with the defendant, in pursuance of the proviso in the deed in that behalf contained; of all which the defendant then had notice; and although the sum of 25*l.*, other parcel of the said sum of 50*l.*, was afterwards, to wit, on, &c., aforesaid, paid by the defendant to the plaintiff in part performance of the said covenant; yet the sum of 5*l.*, being the residue of the said sum of 50*l.*, still was in arrear and unpaid to the plaintiff, contrary to the said covenant. [The declaration then set out two other short payments, and one entire non-payment by the defendant, the two former leaving 17*l.* 10*s.* and 20*l.*, and *997] the latter 50*l.* due:] which several sums of 5*l.*, 17*l.* 10*s.*, *20*l.*, and 50*l.*, amounting to a large sum of money, to wit, 92*l.* 10*s.*, and every part thereof, the defendant, although often requested so to do, had neglected and refused, and still did neglect and refuse to pay to the plaintiff, contrary to the covenant of the defendant, and the tenor and effect, true intent and meaning, of the said deed, &c. Profert of the deed.

The defendant set out the deed upon oyer, and pleaded—that the plaintiff, at the time of the making thereof, was not possessed of, or entitled to, shares in the North-Midland-Railway Company equivalent to twenty shares of 100*l.* in amount, with the dividends payable thereupon, *modo et formâ*.

The special demurrer, assigning for causes—that the defendant was estopped by his deed from pleading such plea—that the plea attempted to put in issue matter of inducement, not forming part of the ground of action—that the matter attempted to be put in issue was immaterial, and might be rejected without affecting the plaintiff's right to recover, and could not be regarded as a part of the consideration for the deed, or as a condition precedent—that the traverse was too large, and attempted to put in issue the equivalent amount of the shares stated to be possessed by the plaintiff, although the said equivalent amount was mentioned under a *videlicet*, and the allegation was only form, or, at most, part of an immaterial statement. Joinder.(a)

Channell, Serjt., in support of the demurrer. The allegation in the declaration, that the plaintiff was a member of the North-Midland-Railway *998] Company, and possessed of twenty shares therein, was wholly unnecessary; it is merely stated by way of inducement, and is not the proper subject of a traverse. The declaration might have commenced by

(a) The points marked for argument on the part of the plaintiff were as follow:—“The plaintiff will rely upon the estoppel, and contend that the plea puts in issue matter of inducement, and that the issue is immaterial, and the traverse too large.”

merely setting out the indenture. It appears by the deed that the defendant undertook to farm the plaintiff's shares. This is the ordinary case of lessor and lessee; and the defendant is estopped from setting up the defence of which he is now attempting to avail himself. In Litt. § 58, it is said to be "a good plea for the lessee to say that the lessor had nothing in the tenements at the time of the lease, except the lease be made by deed indented, in which case such plea lieth not for the lessee to plead."^(a) In his comment on this section, Lord COKE (Co. Litt. 47 b) says: "And the reason of this is, for that in every contract there must be *quid pro quo*, for, *contractus est quasi actus contra*^(b) *actum*; and therefore, if the lessor had nothing in the land, the lessee hath not *quid pro quo*, nor any thing for which he should pay any rent. And in that case he may also plead that the lessor *non dimisit*,^(c) and give in evidence the other matter. If the lease be made by deed indented, then are both parties concluded; but, if it be by deed-poll, the lessee is not estopped to say that the lessor had nothing at the time of the lease made." And he puts this case: "A., lessee for the life of B., makes a lease for years by deed indented, and after purchases the reversion in fee. B. dieth; A. shall avoid his own lease, for he may confess and avoid the lease, which took effect in point of interest, and determined by the death of B. But, if A. had nothing in the land, and *made a lease [999 for years by deed indented, and after purchased the land, the lessor is as well concluded as the lessee to say that the lessor had nothing in the land; and here it worketh only upon the conclusion, and the lessor cannot confess and avoid, as he might in the other case." [MAULE, J. Can you set up an estoppel without pleading it?] Here that is not necessary, for it already appears upon the record. *Bowman v. Taylor*, 2 Ad. & E. 278, shows not only that there may be an estoppel by matter of recital, but also that, where the point of estoppel appears on the pleadings, advantage may be taken of it on demurrer. It is submitted, therefore, that, here the defendant is estopped from denying the plaintiff's possession of the shares.

Secondly, the traverse is also improper, inasmuch as it is confined to the time of entering into the agreement. It is consistent with such traverse that the moment after the making of the agreement the plaintiff had his title perfected.

A further objection is, that this is attempted to be put in issue as though it were a condition precedent that the plaintiff possessed the twenty shares. The traverse does not go the whole of the consideration; *Boone v. Eyre*, 1 H. Bla. 273, n., 2 W. Blac. 1312; notes to *Pordage v. Cole*, 1 Wms. Saund. 319.

Byles, Serjt., (with whom was *Hoggins*.) contra. It is submitted that

(a) See the note to *Doe d. Buller v. Mills*, 4 N. & M. 29; Sir W. Jones, 315, 459; 3 T. R. 441; 6 N. & M. 64., 643; antè, 715, 719, 728, n., antè, Vol. I. 129, 142, Vol. IV. 147 n., 215.

(b) The term appearing to be derived not from *contra* but from *cum*, *contraho* being *contraho*.

(c) Vide *Taylor v. Needham*, 2 Taunt. 278.

the plea is good. If the declaration had commenced in the ordinary way, by stating the indenture, the defendant might have been estopped from denying the plaintiff's title to the shares. But the plaintiff has deprived herself of the right to rely on the estoppel, by setting out upon the record as a substantive and independent allegation, the fact that the plaintiff was possessed of twenty shares in this company. *In 1000] *Palmer v. Ekins*, 2 Ld. Raym. 1550, 2 Stra. 817, 1 Barnard. 103, matter was put in issue which could not have been done if the opposite party had pleaded properly. [TINDAL, C. J. May not a party avail himself of an estoppel by demurring, where the matter of estoppel appears on the record, as well as by pleading it? Could not the plaintiff have replied the indenture, and relied on the estoppel in it? and, if so, why may she not demur, the estoppel appearing on the record?] It is submitted that the plaintiff could not have pleaded such replication. Suppose a rejoinder that the indenture was obtained by fraud, the existence of the indenture would remain untraversed on the record. No case has been cited to show that such a traverse cannot be taken where, besides the indenture, a substantive fact is alleged, the admission of which might prejudice the defendant. [TINDAL, C. J. In *Palmer v. Ekins* it is laid down that if it appears on the record, the opposite party may *demur*, and need not *reply* the estoppel.] In *Bowman v. Taylor* this difficulty did not arise; for there, the declaration commenced by setting out the indenture. Here, the fact is stated as wholly independent of the indenture. There is no averment that the shares mentioned in the declaration are the same as those mentioned in the indenture. [MAULE, J. If they are the same, then the estoppel applies; if not, the allegation is as immaterial as if the plaintiff had averred that she was possessed of a gray horse.]

Per Curiam;

Judgment for the plaintiff.

(a) In that case it was held that if A. by indenture demise to B. lands in which A. has nothing, and A. afterwards purchases the lands *in fee*, and sells them to C. *habentem* to C. and his heirs, C. shall be estopped. It is to be observed, that in *Palmer v. Ekins* the estate in interest, as well as the estate by estoppel, was a *fee simple*; and see *antè*, 715, 720. See, as to the necessity of coincidence, in quantity of estate, *antè*, 728, n.

*1001]

*HALL v. IVE. Nov. 5.

A plaintiff was allowed, by a rule absolute in the first instance, to prosecute *in formâ pauperis*, a suit already commenced.

HALCOMBE, Serjt., after a verdict for the defendant, and a rule absolute for a new trial, moved on the part of the plaintiff, for leave to *proceed* in the action, *in formâ pauperis*. That such leave may be granted *pendente lite* appears from *Doe d. Ellis v. Owens*, 9 M. & W. 455; *Brunt v. Wardle*, 3 Mann. & Gr. 534, 4 Scott, N. R. 188.

TINDAL, C. J. As that point is now clearly settled, you may take a rule absolute in the first instance.

Rule absolute.

RUSSELL v. KNOWLES. Nov. 9.

The affidavit in support of an application for a *distringas*, must show that the calls were made at the dwelling-house of the defendant.
Calls at the defendant's office are insufficient.

DOWLING, Serjt., moved for a *distringas*. His affidavit stated the requisite number of calls and appointments; but it appeared that they had been made, not at the defendant's dwelling-house, but at his office.

MAULE, J. The calls should have been made at the dwelling-house of the party.
Rule refused.

*GRIFFITHS v. DUNNETT. Nov. 20. [*1002

To a count in trespass for assaulting the plaintiff on board a ship on the high seas, and forcing and compelling him, he then being sick, to stand and remain standing on the deck for the space of one hour, a plea justifying the forcing and compelling the plaintiff to stand and remain standing upon the deck, is bad, as being pleaded to that which is mere matter of aggravation.

TRESPASS. The second count of the declaration stated that the defendant, on, &c., with force and arms, assaulted the plaintiff on board of a certain vessel, on the high seas, and then, with great violence, beat, struck, and knocked down the plaintiff, and then also *forced and compelled the plaintiff*, then being very sick, weak, and disordered, *to stand and remain in a standing posture, upon the deck of the vessel for a long time, to wit, one hour*, until the plaintiff, from weakness and exhaustion, sank and fell down, and was wholly unable to stand; whereby the plaintiff then became and was, and continued for a long time thence to be very sick, weak, and disordered.

The defendant pleaded, fifthly, *as to forcing and compelling the plaintiff to stand and remain in a standing position upon the deck of the said vessel* a justification on the ground of insubordination.

Special demurrer, assigning for causes amongst others, that the part of the count to which the plea was pleaded was alleged in the said count either as matter of aggravation only or as part only of one act of trespass, the whole of which act of trespass was not confessed by the plea; and therefore the plea attempted to put in issue matter not issuable, or to put in issue part of one indivisible act of trespass. Joinder.

C. Jones, Serjt., was to have argued in support of the demurrer; but the court called upon

Channell, Serjt., to sustain the plea. The plea is good, and confesses and avoids one of the trespasses charged in the declaration, viz., the forcing and compelling the plaintiff to stand up on the deck of the vessel. [*1003
[TINDAL, C. J. Is that a substantive trespass? Suppose it were the only allegation in the declaration, would it be a trespass?] It is a sort of imprisonment. It is clear that a false imprisonment is a separate trespass. In an action for trespass and false imprisonment, the plea, after justi-

fying the assault, proceeds to justify the forcing the plaintiff along the particular street.

TINDAL, C. J. In the case put, the false imprisonment is prefaced by the word "seized;" there is a continuing trespass. Here, it might be that the only thing done was, that the defendant was forced to stand up: there might be no seizing. The plea seems to me to be bad, as addressing itself to matter of aggravation only.

The rest of the court concurred.

Judgment for the plaintiff.

LEWIS and Others v. MARSHALL and Another. Nov. 23.

The jury having found a verdict for the defendants upon the first count, contrary to the evidence and to the judge's direction, and for the plaintiffs on the second and third counts, a rule nisi was granted for a new trial; on the discussion of which it was agreed that the court should decide upon the construction of the contract declared on in the first count, and, if they should think certain evidence which had been rejected at the trial admissible, should determine as to the effect of it. The court directed that, instead of a new trial, the verdict which had been found for the defendants on the first count should be set aside *on the usual terms*, and be entered for the plaintiffs for such sum as should be ascertained between the parties under the agreement entered into. The parties having agreed as to the amount of the verdict:—*Held*, that the plaintiffs were not entitled to the costs of the trial as to that issue.

ASSUMPSIT by the owners of the *Stratheden*, against ship-brokers, charging them, in the first count, with a breach of a contract to procure for the plaintiff's ship *a full cargo for Sydney, "the rates of freight for which
*1004] would average 40s. per ton, and at least nine cabin passengers, passage money average 75*l.*," and, in the second count, with not collecting, accounting for, and paying over the balance of freights collected by them, pursuant to their contract. The declaration also contained counts for money paid, money had and received, &c.

At the trial before TINDAL, C. J., at the sittings in London after the last Michaelmas term, it appeared that the average rate of freight for *goods* put on board the *Stratheden* by the defendants amounted to 32*s.* only per ton, instead of 40*s.*, as specified in the guaranty declared on in the first count; but that, besides the goods so shipped, the defendants had put on board several *steerage* passengers for the voyage, and that the passage money paid by such *steerage* passengers, (15*l.* per head,) after deducting therefrom the expense of their diet, and the allowance to be made for the tonnage occupied by them and their necessary stores, when added to the freight of the *cargo*, made the average earnings of the whole ship amount to more than 40*s.* per ton. The contract was performed as to the cabin passengers: but, as to the *cargo*, it was insisted on the part of the plaintiffs that it had not been performed. On the part of the defendants, parol evidence was offered to show that the terms "cargo" and "freight," when used in such a contract, and with reference to such a voyage, by the general usage and course of the trade, comprised not only "cargo" and "freight" in the strict and proper sense of those words, as applicable to *goods*, but also *steerage pas*

sengers, and the net profit arising from their passage money. On the other hand, it was insisted that this description of evidence was inadmissible, the terms of the contract being precise and free from ambiguity. His lordship received the evidence; but, conceiving that it ought not to have been received, he ultimately declined to leave it to the jury as **a medium* [**1005* of interpretation, telling them that the words must be construed according to their plain and ordinary meaning, and that the legal effect of the contract was, that the brokers engaged to procure a full cargo of *goods*, (properly so called,) which should average a freight of 40*s.* per ton, which they had failed to do; and *he directed the jury to find their verdict on the first count for the plaintiffs.* The jury nevertheless returned a verdict *for the defendants* on the first and third counts, and for the plaintiffs on the second, damages 18*l.* In the following term the plaintiffs obtained a rule nisi for a new trial, and upon the argument it was agreed between the parties that the court should decide upon the construction of the contract, and, if they should think the parol evidence admissible, should determine as to the effect of it. After time taken to consider, the court, in the last Trinity vacation, (a) directed that, instead of a new trial, the verdict on the first count should be set aside *on the usual terms*, and be entered for the plaintiffs, for such sum as should be ascertained between the parties under the agreement entered into.

It was ultimately arranged that a verdict should be entered for the plaintiffs on the first count for 123*l.* 11*s.* 2*d.*

Sir *T. Wilde*, Serjt., on a former day in this term, moved to enter the verdict on the first count for the above sum in the usual way, as a verdict of the jury, corrected by the subsequent decision of the court.

Shee, Serjt., now showed cause. It is submitted that the plaintiffs are not entitled to the costs. If this had been the ordinary case of a verdict against evidence, a new trial would not have been granted except on **payment of costs by the unsuccessful party.* Under very special [**1006* circumstances, or where a new trial is for misdirection, it may be granted without costs. But in neither case would the unsuccessful party be entitled to costs. Nothing was said about costs on the discussion of the rule. [ERLE, J. If the costs were ordered to abide the event, the defendants would have them upon succeeding on the second trial; but if the plaintiffs succeeded on the second trial, they could not have the costs of the first trial.] The agreement merely put the court in the place of a second jury, and there is nothing in it to exclude the court from exercising its discretion. The judgment of the court directing the verdict on the first count to be set aside on the usual terms, would rather appear to give the costs to the defendants.

Sir *T. Wilde*, Serjt., in support of his rule. The verdict on the first count was clearly perverse, as the Chief Justice directed the jury to find for the plaintiffs; and a new trial would have been granted, as a matter of course,

(a) *Vide antè*, 745.

without costs. In order to avoid the useless expense of a second trial, the plaintiffs by the agreement compromised their claim for damages, and consented that the court should take into their consideration the effect of certain evidence which clearly was not admissible. The fair construction of the agreement is, that the defendants were to be placed in the same position as to costs as that in which they would have stood if the jury, in the first instance, had done their duty. Nothing was said at the time about costs, for each party was aware of the consequences which would follow from the verdict being entered one way or the other. When the Lord Chief Justice, in his judgment, said that the verdict was to be set aside on the usual terms, *1007] his lordship had forgot for the moment how the case stood. [*TINDAL, C. J. I rather think I used those words in order to leave the matter open, as neither party had said any thing as to costs.]

TINDAL, C. J. I agree that the proper point for the consideration of the court is, what was the intention of the parties in entering into the agreement. In order to arrive at their meaning, we must look at their situation at the time. There was a verdict for the defendants on the first count, against the express opinion of the judge who tried the cause. There can be no doubt, therefore, that the court would have set aside that verdict, without costs. In order to avoid the necessity of going down to a second trial, both parties agreed to give the court all the functions of a jury. What we had to consider was, what the jury should have done if the case had gone to a second trial; and we thought the verdict upon the first count clearly wrong. It therefore seems to me that the costs of the first trial are simply thrown away, and that the plaintiffs are entitled to have a verdict entered for them on that count, for the amount agreed upon, but without costs.

COLTMAN, J., concurred.

MAULE, J. I am of opinion that the rule should be discharged, unless modified as suggested by the Lord Chief Justice. The court had to dispose of a rule for a new trial, the former verdict being contrary to the opinion of the judge, and wrong. While that rule was pending, an agreement was come to between the parties, the subject of which was the future trial, if it should take place at all, and how it should terminate. The agreement was, not to take from the court the power of doing that which the court and jury would have done if the new trial had taken place; but it left to the court *1008] what they had before, the power of deciding on what terms as to costs the new trial should be had; for it was entirely silent on the point. After the agreement was come to, it was for the court, and is now, to decide on what terms the new trial should take place. The court think this is a case in which there ought to be a new trial, without payment of costs. If we look strictly to the words of the Lord Chief Justice in giving judgment, the defendants would be entitled to costs; for the judgment was that the verdict should be set aside *on the usual terms*, which means that the verdict should be set aside *on payment of costs*. I think the rule should

ne modified by depriving the plaintiffs of the costs of the issue upon which the verdict is to be entered.

ERLE, J. I am of the same opinion. The agreement had reference to the verdict which the jury on the second trial might give, and not to that which the first jury ought to have found. The parties consented that the court should perform the functions of the second jury, with all the consequences of a verdict pronounced by them; and, under no circumstances, would the defendants have been liable to the costs of the first trial. It seems to me that this result is, in reality, not disadvantageous to the plaintiffs; for, it is probable, that a second jury might have been reluctant to give them substantial damages.

Rule accordingly.

*HEMSWORTH v. BRIAN. Nov. 23.

[*1009

On the last day but one of Michaelmas term, the plaintiff moved to set aside an award made in Hilary vacation, for an objection of which he had knowledge in Easter term:—*Held*, that the application was too late, notwithstanding a fiat had issued against the plaintiff before the date of the award, and he did not receive a copy of such award until the 8th of May.

By a judge's order, (afterwards made a rule of court,) dated the 23d of May, 1843, and made in this cause, it was ordered that *the said cause and all matters in difference* between the parties should be referred to an arbitrator (a layman)—the costs of the said cause and of the reference and award to abide the result of the award.

The arbitrator *on the 23d of March*, 1844, made his award as follows:—
 “I do find, award, and determine, that, at the time of commencing the said action, the plaintiff had not any cause of action for or in respect of the several matters and things respectively mentioned and contained or referred to in the first count in the pleadings in the said cause contained; and that, in case the trial in the said cause had proceeded, the issue joined on or in respect of the said count should and ought to have been found for the defendant: and I further find, award, and determine, that, on the 2d of March, 1843, and at the time of the commencement of the said action, the defendant was indebted to the plaintiff in the sum of 68*l.* 9*s.* 7*d.*, on the second, third, and fourth counts in the said declaration mentioned: and that, in case the trial in the said cause had proceeded, the issues joined on the second, third, and fourth counts in the said pleadings contained should and ought to have been found for the plaintiff: and I do further find, award, and determine, that, on an account taken of all matters referred to me by the said order, (including the said sum of 68*l.* 9*s.* 7*d.*.) the plaintiff was at the date of the said order, and still is, indebted to the defendant in 17*l.* 7*s.* 5*d.*: and I further *award, order, and direct that the plaintiff shall, on the 1st day of April next, at, &c., pay or cause to be paid unto the defendant, or his attorneys, for the use of the said Brian, 17*l.* 7*s.* 5*d.*: and I further award, order, and direct that the plaintiff shall,

[*1010

on the 30th of March instant, deliver up or cause, &c., unto the defendant, his executors, &c., the following warrants of wines and brandy, namely, a warrant for one hogshead of port wine, numbered 2260, now or lately lying, &c., and marked, &c. : and I do further find that the plaintiff is in possession of certain wines in bottle, the property of the defendant, consisting of, &c. ; and I do hereby award, order, and direct that the plaintiff shall, on the 30th of March instant, deliver up all the said wines in bottle to the defendant, or his servants or agents authorized by writing under his hand to receive the same : and I do award, order, and direct, that, if default be made by the plaintiff, his executors, &c., in payment of the said sum of 17l. 7s. 5d., to the defendant, his executors, &c., at the time herein by me appointed, or, if the plaintiff, his executors, &c., shall not, on the 30th of March instant, deliver up to the defendant, his executors, &c., the said wine-warrants and brandy-warrant, and the said wines in bottle, hereinbefore directed by me to be delivered up, that then and in either of the said cases, after making this my award a rule of the court of Common Pleas, the defendant may immediately proceed by attachment or otherwise for the recovery of the said sum of 17l. 7s. 5d., and of the possession of the said wine-warrants and brandy-warrant and wines in bottle, or any of them, as the case may require : and I do award, &c., that the plaintiff shall take to, retain, and keep four butts of sherry wine, &c., &c., which articles and things were formerly the property of the defendant, and are now or lately were in the possession of the plaintiff, &c. : and I do lastly award, &c., *1011] that, after the due performance of this my award, and the payment of the costs of the said cause, and of the said reference, and of this my award, the plaintiff and the defendant, and their executors or administrators, respectively shall, within ten days after the same shall have been respectively tendered to him or them for execution, and at the costs and charges of the party requiring the same, sign, seal, and as their respective acts and deeds deliver, each of them, his executors, &c., unto the other of them, his executors, &c., mutual releases in writing of all and all manner of actions and suits, claims, and demands whatsoever, from the beginning of the world up to the day of the date of the said order of reference."

Channell, Serjt., on behalf of the plaintiff, now moved to set aside this award. There are several objections to this award, but as two terms have elapsed since the making of the award, it will be proper to call the attention of the court to the date. The award was made on the 23d of March, and it appears by the affidavits in support of the application, that a fiat of bankruptcy was granted against the plaintiff on the 16th of that month, that he had no notice of the award until the 8th of May, his attorney in the arbitration, having ceased to be employed by him upon his bankruptcy taking place, and that the plaintiff received no copy of the award until the 8th of November instant. [TINDAL, C. J. You would put the notice of the award on the same footing as the making of the award.] That is so ; but this is a case for the discretion of the court, in which they are not bound by

the statutory limitation as to moving to set aside an award before the last day of the term next, after the making and publishing of the award prescribed by the 9 & 10 W. 3, c. 15, and, although it may be, that in cases of awards not made under the statute, the court, for convenience, generally adheres to the statutory *limitation, this is a case in which the [*1012 security of the rule may, with propriety, be retained. *In re Smith v. Blake*, 8 Dowl. P. C. 133; *Rogers v. Dallimore*, 6 Taunt. 111, 1 Marshall, 471; *Potter v. Newman*, 2 C., M. & R. 732.

TINDAL, C. J. The grounds upon which this motion is supported, are, first, that the plaintiff had reason to expect notice of the meeting, and secondly, that the commissioners of bankruptcy have come to a different finding from the arbitrator. Whatever force may belong to these objections, the difficulty is, as to the time which has been suffered to elapse. The cases show, not indeed the existence of a strict rule, but a general adoption of the limits which the statute prescribes with respect to a case falling within it, as a guide in the exercise of their discretion in cases which are out of the statute. Here, the plaintiff had notice on the 8th of May,—the last day of Easter term,—that the award had, &c., but instead of coming to the court in Trinity term, he takes no step until the last day but one of Michaelmas term. In that long interval he treated the award as a good award, and it may have been acted upon by the successful parties as an undisputed award.

The rest of the court concurred, and

Channell took nothing by his motion.(a)

(a) An attachment was afterwards moved for. See 1 C. B. 131.

*COVINGTON v. HOGARTH. Nov. 12. [*1013

The creditor of a trader may proceed by action against his debtor, notwithstanding the pendency of proceedings in the court of bankruptcy, under the 5 & 6 Vict. c. 122, for the recovery of the same debt; and, though the debt be paid under pressure of these proceedings, the action will be stayed only upon payment of costs.

ON the 31st of August, 1844, the plaintiff filed an affidavit in the court of bankruptcy, sworn on the preceding day, stating that the defendant was indebted to him in 60*l.* 17*s.* 6*d.* for work and labour and for money paid to the defendant's use. On the 2d of September, the defendant was served with a notice requiring immediate payment. On the same day, the defendant was served with a copy of a writ of summons in this action, tested on the 31st of August, endorsed for 60*l.* 17*s.* 6*d.* debt, and 2*l.* 2*s.* costs. On the 4th of September, particulars of the plaintiff's demand were delivered, with a notice requiring immediate payment of the amount, 60*l.* 17*s.* 6*d.* On the 6th of September, the defendant was served with a notice that the plaintiff abandoned the affidavit and notice, and did not intend further to proceed thereon; the defendant immediately afterwards was served with a

summons, under the hand of one of the bankruptcy commissioners, requiring him to appear before the commissioner in rotation, at the court of bankruptcy, on the 12th of September, to admit or deny the demand of the plaintiff, who claimed of him the sum of 60*l.* 17*s.* 6*d.* for a debt. A notice upon that summons stated that it was served upon the defendant pursuant to the provisions of the 5 & 6 Vict., c. 122, and was founded upon an affidavit of debt filed in the court of bankruptcy, London, on the 5th of September, 1844. On the 27th of September, the defendant filed an admission that he was indebted to the plaintiff in 60*l.* 17*s.* 6*d.* On the 9th of October, the defendant paid that sum to the plaintiff's attorney.

On the 31st of October, the plaintiff's attorney delivered a declaration in the action, requiring the *defendant to plead thereto in four days. *1014] The particulars of the plaintiff's demand were the same as those delivered on the 4th of September. Whereupon the defendant took out a summons to stay proceedings, which CRESSWELL, J., dismissed, referring the parties to the court.

Channell, Serjt., upon an affidavit stating these facts, and that the defendant never was indebted to the plaintiff on any account other than the sum of 60*l.* 17*s.* 6*d.* so paid,—in this term obtained a rule calling upon the plaintiff to show cause why all further proceedings in this cause should not be stayed, the plaintiff having recovered and obtained payment of the debt for which the action was brought, under the proceedings in the court of bankruptcy, and having given the defendant a discharge for the same. He referred to the 59th section of the 6 Geo. 4, c. 16, and 5 & 6 Vict., c. 122, ss. 2, 11, 12, now cited. *Woolley, ex parte*, 1 Rose, 394; *Kemp v. Potter*, 6 Taunt. 549; *Ransford v. Barry*, 7 Dowl. P. C. 807.

Talfourd, Serjt., now showed cause. The question is, whether the defendant having paid the debt, the proceedings in this action are to be stayed *upon* or *without* payment of costs. The defendant will attempt to assimilate the case to that of a creditor, who having sued for a debt seeks to prove it under a fiat, so as to bring it under the equity of the 6 Geo. 4, c. 16, s. 59. No such similarity exists. Here, the creditor being uncertain whether the defendant will or will not secure the debt, sues out a writ of summons. The act contemplates the taking of such proceedings. This is somewhat analogous to cases under the malicious arrest act, 43 G. 3, c. 46; if the proceedings are improper, costs are given to the defendant. *1015] **TINDAL*, C. J. The plaintiff has compelled the defendant to pay by threatening to make him a bankrupt.] If the plaintiff has proceeded improperly in the court of bankruptcy, the defendant has his remedy there. Unless the taking of the double proceedings had been contemplated, the act would not have required the giving of a bond conditioned to pay the costs of any action commenced or to be commenced for the recovery of the same debt. The 11th, 12th, 18th, and 19th are the only sections which have any bearing upon the question now before the court, and they

contain nothing opposed to the right of the creditor to pursue both courses simultaneously.

Channell, Serjt., in support of his rule. Where the consequences are penal, it must be worth while to see whether the just and equitable rule prescribed by the 6 G. 4, c. 16, s. 59, cannot be applied in this case, where a more extensive remedy is given. [*COLTMAN*, J. The party does not become bankrupt by denying the debt, but by not giving security for an admitted debt.] If a fiat had issued, it is quite clear that the plaintiff could not have entered a claim under the fiat without abandoning the action; and he ought not to be in a better situation, where, instead of a proof against the debtor's estate, he obtains actual payment.

TINDAL, C. J. I cannot help thinking that the 5 & 6 Vict. c. 122, which speaks, sect. 13, of the trader's entering into a "bond, in such sum, and with two sufficient sureties, as the court shall approve of, to pay such sum as shall be recovered in *any action which shall have been brought or shall thereafter be brought*," contemplated the pendency of an action at the same time with the proceedings authorized by that statute. The 6 G. 4, c. 16, s. 59, expressly provides "that no *creditor who has brought [*1016 any action or instituted any suit against any bankrupt in respect of a demand prior to the bankruptcy, or which might have been proved as a debt under the commission against such bankrupt, shall prove a debt under such commission, without relinquishing such action or suit. The 5 & 6 Vict. c. 122, being silent on the subject, I see no reason why the creditor should be debarred from pursuing the double remedy. In cases where the debt is paid after action brought, I think the action can only be put an end to by the ordinary course, viz., by a rule for staying proceedings on payment of costs.

COLTMAN, J. I also am of opinion that the 5 & 6 Vict. c. 122, contains no clause which would authorize us to do that which is prayed.

MAULE, J. We are now called upon to apply the equity of the 6 G. 4, c. 16, s. 59, to the enactments of the 5 & 6 Vict. c. 122. The provisions of the two acts relate to totally different states of circumstances. Where the debt is really due, if the party wishes to avert the penal consequences provided by the second act, he may do so by giving security. If he has a good defence, he may go on with the action, and if the defence is successful, he will obtain his costs; if otherwise, he must pay costs. That which the court are now asked to do would not be enlarging the benefit of that statute, but applying it to a state of things to which it was not intended to apply. The action having been properly brought, the defendant is not entitled to relief except upon payment of the debt and costs.

ERLE, J. The statute applies in those cases only where the debt is really due; it does not vary the liability to costs. Rule discharged.

*1017]

*WILMOT v. WILLIAMS. Nov. 5.

An allegation of presentment to the drawee of a bill, is proved by evidence of presentment at the place at which, by the acceptance, it is made payable.

ASSUMPSIT, by the endorsee of a bill of exchange, drawn by the defendant upon one Cottingham, and by him accepted payable at Robarts, Curtis and Co., endorsed by the defendants to J. R. James, and by James to the plaintiff, and duly presented to Cottingham, but not paid; with an averment of notice of dishonour.

The first plea traversed the presentment—the second, the notice of dishonour.

At the trial before CRESSWELL, J., at the sittings at Guildhall, after last term, the plaintiff proved presentment at Robarts, Curtis and Co.'s, non-payment, and notice to the defendant. It was objected that the allegation of a presentment to Cottingham was not proved by a presentment at the bankers'. This objection was overruled, and a verdict was found for the plaintiff.

Byles, Serjt., now moved for a new trial on the ground of misdirection, and that the verdict was against evidence. Although the 1 & 2 G. 4, c. 78, applies only to actions against the acceptor, *Gibb v. Nathan*, 8 Bingh. 214, 1 M. & Scott, 387, 4 New Cases, 314, 5 Scott, 667, 1 Arn. 139, (a) yet the plaintiff, having alleged a presentment to Cottingham, was bound to prove a presentment to him personally, or at his place of business. There is therefore a variance between the allegation and the evidence given to support it. [MAULE, J. The defendant undertook, by his acceptance, to be at Robarts, Curtis and Co.'s to pay the bill. TINDAL, C. J. He

*1018] *names a place at which this is to be presented to him for payment.]

Per curiam:

Rule refused. (b)

(a) And see *Blake v. Beaumont*, ante, vol. iv. 7, 4 Scott, N. R. 617.

(b) The objection, if available, would sound rather in arrest of judgment. As between the parties to this action, the acceptance operated as a special acceptance, binding the holder to present at the place indicated by the drawee; but, consistently with the allegations in this declaration, the presentment to Cottingham may have been at some place distant from his residence and his place of business, and where it would be almost impossible to effect a payment. A drawer engages that the bill shall be accepted, if presented to the drawee; and that it shall be paid when it becomes due, on presentment to the drawee, if accepted generally or if unaccepted, and on presentment at the place indicated, if accepted specially, or that he will pay the amount if properly called upon so to do. Except in the case of an acceptance at a particular place, "and not elsewhere," the acceptor is entitled to no presentment at all, and can protect himself from liability to an action only by tracing the endorsements and carrying the money to the last endorsee, if such endorsee be in England when the bill becomes due.

Quere, whether, in order to maintain an action against an acceptor, where, as often happens, the holder—or each of the holders, in the case of a bill held by a firm—is out of England, during the whole of the day on which the bill falls due, it is not necessary to prove a demand of payment, either by presentment of the bill or otherwise, made before action brought.

HERRING v. WATTS. Nov. 14.

In debt for use and occupation, the court allowed the venue to be changed upon the usual affidavit.

DEBT, for use and occupation. Upon the usual affidavit, the defendant obtained a judge's order for changing the venue from London to Norwich; which

Byles, Serjt., now moved to set aside.—The defendant cannot change the venue in this action upon the common affidavit, showing that the whole cause of action arose in *a different county from that in which the action is laid. In *Duplessis v. Chalk*, 2 Stra. 878, (a) in an action of debt for rent brought in London, upon a demise, by parol, of lands in Kent, the court refused to change the venue to the latter county, saying that they never did it in debt, (b) and that it was not according to the practice. There is no difference, in principle, between debt for rent and debt for use and occupation. [MAULE, J. In the action for use and occupation, the cause of action is the actual enjoyment. The reason that it cannot be removed in debt for rent is, that the demise may be out of the county. (c) A demise is a contract everywhere.] [*1019]

Per curiam :

Rule refused. (d)

(a) More fully reported, 1 Barnardiston, B. R. 375; S. P. Pratt v. Ward, 1 Alcock and Napier, 145.

(b) i. e. where the action is necessarily in debt. The statute of 11 G. 4, c. 19, s. 14, gives an action on the case: the action of debt for use and occupation would seem to be an extension of that remedy, by judicial authority. And see *Gibson v. Kirk*, 1 Q. B. 150, 1 G. & D. 252.

As soon as "an action on the case" given by this statute, was construed to mean "an action of *indebitatus assumpsit*," the transition to an action of debt against the party who was so indebted would be easy.

(c) The demise may therefore be laid as having been made in a county in which the land does not lie: but the supposition, that the demise may have been actually made in the foreign county, appears to be excluded by the terms of the common affidavit.

(d) Verbal contracts are, for the purpose of jurisdiction, nullius, or rather, *uniuscujusque, loci*: for the purpose of probate, they are *bona notabilia* within the diocese in which the contract-debtor is commorant at the time of the death of the contract-creditor; for the purpose of changing or retaining venue,—with the view of giving effect to the provisions of the statute 4 H. IV. c. 18, as to trial in the proper county,—they are generally treated as belonging to the county in which they were actually made.

*PETRIE and Another v. CULLEN. Nov. 23. [*1020]

A peremptory undertaking to try is an absolute engagement, the breach of which admits of no excuse; per *Coltman* and *Maule, Js., dubitantibus*, *Tindal, C. J., and Erle, J.*

A peremptory undertaking was given to try at the sittings after Trinity term, but the plaintiff did not enter the cause until the evening of the last day allowed for that purpose, in consequence of which it was made a remanet. On the first day of Michaelmas term, the defendant obtained a rule absolute for judgment as in case of a nonsuit. The court refused to discharge the rule or to set aside the judgment signed thereon, although the defendant had lain in prison ten months from inability to find bail for 25*l.*, the amount of the debt sued for.

DEBT. The action was commenced on the 29th of December, 1842, and was brought to recover 25*l.* 15*s.* 3*d.* for money alleged to have been paid by the plaintiffs to the use of the defendant at his request. On the 30th

the defendant was arrested on a writ of *capias*; and being unable to procure bail, he remained in custody until he was discharged by *supersedeas* in October, 1843. On the 9th of January, 1844, the plaintiffs declared; on the 25th of February, the defendant pleaded *nunquam indebitatus*; on the 13th of November the plaintiffs added the *similiter*. In Easter term last the defendant obtained a rule nisi for judgment as in case of a nonsuit, which was discharged on a peremptory undertaking to try at the sittings after Trinity term. The cause was entered for trial on the evening of the 11th of June, the last day for entering causes for the sitting; and, in consequence of its being so low in the list, it was necessarily made a remanet, and the plaintiffs delivered no brief to counsel.

On the 2d of November, defendant having obtained a rule absolute for judgment as in case of a nonsuit,

Channell, Serjt., on the 9th of November, obtained a rule calling upon the defendant to show cause why his rule, and the judgment signed in pursuance thereof, should not be discharged with costs.

*1021] **Byles*, Serjt., now showed cause. The plaintiffs having omitted to bring the cause to trial pursuant to their undertaking, the rule absolute for judgment as in case of a nonsuit was regular. The words of the statute are clear.(a) The plaintiffs by their undertaking bind themselves to try at all events: that is the condition upon which they are allowed further time. [TINDAL, C. J. The making the cause a remanet was no default.] The plaintiffs should have applied to enlarge their undertaking. In *Ward v. Turner*, 5 Dowl. P. C. 22, it was expressly determined, that, where a plaintiff has given a peremptory undertaking, and is prevented from fulfilling it by the sudden illness of the judge, that is not a sufficient excuse to prevent the defendant from obtaining a rule absolute for judgment as in case of a nonsuit. In *Sell v. Adams*, 7 Dowl. P. C. 672, it was held, that, where a plaintiff gives a peremptory undertaking to try at the next sheriff's court, he is bound to take proper steps to try the cause, although it may be necessary for him to obtain a special appointment of a court from the sheriff. In *Negrete v. Martorell*,(b) a rule for judgment as in case of a nonsuit was discharged on the 2d of May, upon a peremptory undertaking to try within two months from that time. The plaintiff, after the expiration of the two months, gave notice of trial for the 8th of August; when the cause was tried as an undefended cause, and a verdict was obtained for the plaintiff, which was set aside as irregular. The defendant relies upon the express words of the statute.(c) [TINDAL, C. J. The words "shall neglect" would seem to denote some fault *1022] on the part of the plaintiff.] Here, the plaintiffs did not enter the cause till the evening of the 11th.(d) It was the plaintiffs'

(a) "And if the plaintiff or plaintiffs shall neglect to try such issue within the time so allowed, the said judge or judges shall proceed to give such judgment as aforesaid." 14 G. 2, c. 17, s. 1

(b) Thus, ante, vol. vi. p. 756; 7 Scott, N. R. 483; 1 Dowl. & Lowndes, 375.

(c) Vide supra, note (u), post, 1023.

(d) If more activity had been displayed, the complaint on the part of the defendant would

intention to try the cause at the last sittings. The plaintiffs are not precluded by this judgment from bringing a fresh action.

Channell, Serjt., in support of his rule. The single question is, whether the plaintiffs have complied with their peremptory undertaking. That undertaking was, to proceed to trial according to the course and practice of the court: and with that undertaking they have literally complied, so far at least as was practicable. They entered the cause for trial within the time allowed by the practice of the court, and it was through no default of theirs that it was not actually tried. [MAULE, J. The question is, whether the undertaking is an absolute one, to try the cause at all events, or whether it is satisfied by the plaintiffs' doing all they reasonably can to get the cause tried. It seems to me that it is as absolute as an undertaking to pay a given sum on a day named.(a) From the course they pursued, I think the plaintiffs clearly meant that the cause should *not* be tried at the last sittings.] All that the plaintiffs can, in reason, be considered as having undertaken to do, is, to put the cause in a course for trial. *Ward v. Turner* is hardly an authority upon which the court will act. The *propriety of the de- [*1023 cision has been somewhat doubted. The facts of that case differ from the statement in the marginal note. There, the rule for judgment as in case of a nonsuit was discharged upon the ordinary undertaking. The plaintiff accordingly took the cause down for trial at the spring assizes, 1835, but was unable then to try, in consequence of the sudden illness of the judge; he then gave notice of trial for the next spring assizes, but withdrew the record; and it was not until after this *second* default that the rule absolute for judgment as in case of a nonsuit was obtained. [COLTMAN, J. The judgment must be considered as having proceeded upon the first default.] The part of the judgment which relates to the first default was a mere *obiter dictum*. In *Negrete v. Martorell*, the plaintiff was guilty of a default in not proceeding to trial within the time limited by his undertaking; and the defendant might have been materially prejudiced by a trial after the time had expired. In *Sell v. Adams* the excuse was clearly insufficient.

TINDAL, C. J. The statute 14 G. 2, c. 17, s. 1, begins by stating, "that, where any issue is or shall be joined in any action or suit at law in any of his majesty's courts of record at Westminster, &c., and the plaintiff or plaintiffs in any such action or suit hath or have neglected, or shall *neglect to bring such issue on to be tried according to the course and practice of the said courts respectively*, it shall and may be lawful for the judge or judges of the said courts respectively, at any time after such neglect, upon motion made in open court, (due notice having been given thereof,) to give the like

probably have been, that no person but the plaintiffs' attorney could derive any benefit from urging on a suit to obtain a judgment for 25*l.* 15*s.* 3*d.* against a party who had lain ten months in prison from inability to make a deposit, or to obtain bail, to that amount.

(a) Looking at the terms of the undertaking, not explained or qualified by the statute, this would be clearly so. But *quære* whether the undertaking ought not, with reference to the statute, to be read as an undertaking *not to neglect* to try, and, if that be not the true construction, whether the undertaking is not void as varving from the statute.

judgment for the defendant or defendants in every such action or suit, as in cases of nonsuit, unless the judge or judges shall, upon just cause and reasonable terms, allow any further time or times for the trial of such issue."

*1024] It then goes on to say, that, "if the plaintiff or *plaintiffs shall neglect to try such issue within the time or times so allowed, then and in every such case, the said judge or judges shall proceed to give such judgment as aforesaid." If this had been a new question, I should have held, and am at present disposed to hold, that the word "neglect" in the latter part of this section should receive the same interpretation as it bears in the former part, namely, a wilful and inexcusable default in putting the cause in a course of trial; and, therefore, I should have been slow to decide, that, where a plaintiff enters his cause for trial according to the usual practice, and without any default of his it is made a remanet, he has forfeited his undertaking. But I do not think it necessary, on the present occasion, to give any positive opinion upon the point; because here, there are circumstances to show that the plaintiffs were guilty of a wilful default. The plaintiffs, when they undertook to proceed to trial at the sittings after Trinity term, undertook at the least to use due diligence to bring the cause on for trial at those sittings. Now it appears that the cause was not entered until late at night on the 11th, the last day allowed for that purpose, so that it could not by any reasonable probability be tried at those sittings. Coupling this with the delays in the previous stages of the cause, I think the plaintiffs have neglected to proceed to trial according to their undertaking, and that we ought not to interfere.

COLTMAN, J. I do not think it desirable to depart from the rule judiciously laid down by my brother COLERIDGE, in *Ward v. Turner*.

MAULE, J. I also am of opinion that this rule should be discharged. This is a proceeding under the 14 G. 2, c. 17, s. 1, which enables the court, in the event of a plaintiff neglecting to proceed to trial according to *1025] the *course and practice of the court, to give judgment for the defendant as in case of a nonsuit, unless they shall see just cause to let the plaintiff in to try upon terms; and then it proceeds to enact, that, if the plaintiff shall neglect to try the issue within the time allowed, the court shall proceed to give judgment as aforesaid. That judgment has been given here; and, I think, very properly. When the plaintiffs first made default, the court gave them a larger indulgence than is ordinarily given, and discharged the rule on their peremptory undertaking to proceed to trial at the sittings after last Trinity term. I have always understood, notwithstanding the words "shall neglect," which occur in the statute, that the meaning of a peremptory undertaking is, that the party undertakes, at all events, that the trial shall take place—not that he shall do his best to bring the cause to trial. That this is so, is clear from two circumstances—first, that, in case of default, the rule is absolute in the first instance; for, if the undertaking were, as is suggested, a mere undertaking to use reasonable diligence to obtain a trial, whether it had been performed or not would

depend in each case upon the particular facts, and then the rule would be a rule nisi only. (a) The other reason is this: that sometimes a party willing to give a peremptory undertaking, says he cannot undertake to try at the next sittings or assizes, by reason of circumstances which justify a longer postponement: that assumes that the plaintiff might be guilty of a breach of the condition without any actual default. (b) In truth, the undertaking to try within a *particular time is like a warranty to sail on or before a given day, for a breach of which adverse winds form no [*1026 excuse. (c) To construe such contracts in the way suggested, would, in effect, amount to a prohibition; which would occasion very considerable inconvenience and embarrassment to the business of mankind.

Assuming, however, the construction contended for on behalf of the plaintiffs, to be the correct one, it appears to me that, instead of using due diligence to try the cause, the plaintiffs have used every delay consistent with a colourable prosecution of the suit.

ERLE, J. Whatever be the rule of practice, I think that here the plaintiffs have done all they could to prevent the cause from being tried at the last sittings; and I therefore think that the rule should be discharged.

Rule discharged, with costs. (d)

(a) In some cases, where, from the nature of the application, it seems to be highly improbable that it can be successfully resisted, the courts grant a rule absolute in the first instance, leaving it to the other side to move to discharge it.

(b) Whatever construction is put upon the statute, a plaintiff who had reason to believe that his witness would not return from Canton for twelve months, would, by always undertaking to try at the next sittings, create the necessity of occupying the court and harassing the defendant and himself with successive applications in every term, supposing him to escape a rule absolute for judgment as in case of a nonsuit in respect of some one of his foreknown defaults; and during all this time the defendant would be kept in uncertainty as to the time of trial.

(c) Reading the engagement as strictly absolute, the consent of the defendant would appear to be as necessary to the enlarging of the peremptory undertaking to try at the next sittings or assizes, as the consent of the charterer would be to the enlargement of the time within which a ship ought, according to a warranty, to sail.

(d) If the plaintiffs had offered a *stet processus*, the court would perhaps have been inclined to regard as less inexcusable the numerous indications of a disinclination on the part of the plaintiffs to incur further expense in the prosecution of a hopeless action. If a *stet processus* had been offered and refused, and the court had been equally divided upon the point of law, the plaintiffs' rule would have been neither made absolute nor discharged, but would have fallen to the ground, leaving the judgment as in case of a nonsuit, in full force: had the case taken this course the plaintiffs would have been relieved from payment of the defendant's costs of the motion.

*BUSH and MULLENS v. SAYER, and [*1027

In re JOHN BUSH and RICHARD MULLENS, Two, &c. Nov. 19.

No jurisdiction is given to a court of law to refer an attorney's bill to taxation, by 5 & 6 Vict. c. 73, s. 37, although an action be pending on such bill in such court of law, where no part of the business is transacted in any court of law or equity.

ON the 29th of June, 1844, Messrs. Bush and Mullens commenced the above action to recover 148*l.* 18*s.* 6*d.*, the amount of four several bills of costs for business done as the defendant's solicitors, and of certain moneys

paid for his use. The bills were delivered at the request of the defendant on the 8th of May, 1843, to the agent's attorney, in a letter referring to the bill, and signed by Bush and Mullens. The bills contained no charge for business in a court of law. On the 1st of May, 1844, Bush and Mullens were served with a summons to show cause why the bills should not be referred to one of the masters of the Queen's Bench, for taxation. Upon this summons COLERIDGE, J., declined to make any order.

On the 5th of July, 1844, being more than twelve months after the delivery of the bills, a summons was served upon Bush and Mullens in the above action, to show cause "why their bills of costs, charges and disbursements for the recovery whereof this action was brought, should not be referred to the master to be taxed, and why the plaintiffs should not, upon the taxation, give credit for all sums of money by them received from, or on account of, the defendant, and why the master should not tax the costs of such reference, and certify what, upon such reference, shall be found due *1028] to or from either party in respect of such bills and demand, and of the costs of such reference, and why the plaintiff should not be restrained from prosecuting the said action touching such demand, pending such reference, and why upon payment of what (if any thing) may appear due thereon to the plaintiffs, together with the costs of the action, to be also taxed and paid, all further proceedings should not be stayed." On the 9th of July, 1844, COLTMAN, J., ruled that there had been a due delivery of the bills to the defendant more than twelve months before the commencement of the action.

The defendant then contended, that there were special circumstances which would justify the taxation of the bills notwithstanding the expiration of the twelve months. The special circumstances that were relied on were as follow,—that the bills contained items which could make them taxable at common law, and, therefore, the only mode of procuring their taxation was by petition to the Master of the Rolls under the 6 & 7 Vict. c. 73; that instructions had been laid before counsel to prepare such petition, but that he advised that the Master of the Rolls had no jurisdiction to grant such an order, no proper delivery of the bills having taken place; that within twelve months from the alleged delivery of the bills, application was made by the defendants to the plaintiffs' agents to sign the bills so as to bring them clearly within the statute, which they had declined to do; and that a petition was then pending before the Master of the Rolls, praying that the bills might be ordered to be delivered and taxed.

The plaintiffs contended that as the bills were not taxable at the time of their delivery, they were not within the 6 & 7 Vict. c. 73. An order was however made by that learned judge in the terms of the summons, and further ordering that in default of payment of what should be found due on *1029] the taxation, the plaintiffs should be at liberty to sign judgment for the amount. This order, Sir T. Wilde, Serjt., on a former day in this term, obtained a rule nisi to rescind.

Talfourd, Serjt., (with whom was *H. J. Hodgson*,) now showed cause. An action being depending upon these bills, the learned judge had the jurisdiction exercised by him on this occasion. The provisions of the 6 & 7 Vict. c. 73, are retrospective; *Binns v. Hey*, 1 Dowl. & L. 661. The special circumstances (a) gave the learned judge jurisdiction, notwithstanding the twelve months had expired. [MAULE, J. The legislature seem to have considered the officers of the Lord Chancellor and the Master of the Rolls to be the proper persons to tax conveyancing bills. The thirty-seventh section gives jurisdiction in such cases as the present, to the courts of equity: and the fact that an action has been brought upon the bills cannot take away their jurisdiction, or give that jurisdiction to us. TINDAL, C. J. The words of the 6 & 7 Vict. c. 73, s. 37, are very clear. That statute directs that "it shall be lawful, in case the business contained in such bill, or any part thereof, shall have been transacted in the High Court of Chancery, or in any other court of equity, or in any matter of bankruptcy or lunacy, or in case no part of such business shall have been transacted in any court of law or equity, for the Lord High Chancellor or the Master of the Rolls to refer such bill, and the demand, &c., thereupon, to be taxed." The original delivery of the bills appears to be good: the bill is to be subscribed with the proper hand of the attorney, or be enclosed in, or accompanied by, a letter subscribed in like manner, referring to such bill. ERLE, J. The proviso as to special circumstances *gives to this court in [*1030 cases where it possessed none, without such an example, jurisdiction; it speaks of such references as *aforesaid*.] The order for judgment was inserted at the request of the plaintiffs; the reference to taxation, therefore, was assented to by them. [MAULE, J. That was the act of the judge, under the power given to him by section 43.]

Sir *T. Wilde*, Serjt., *contra*, was stopped by the court.

Per curiam:

Rule absolute.

(a) When cause was shown against this rule, the petition above referred to had been dismissed with costs.

POOLE v. GRANTHAM and Others. Nov. 25.

In *trespass quare domum fregit et de bonis asportatis*, the defendants pleaded four pleas, to one of which the plaintiff demurred. After judgment for the plaintiff on the demurrer, a general verdict was found for the plaintiff upon the issues, damages 20s. There was no certificate under the 3 & 4 Vict. c. 24: *Held*, that the plaintiff was only entitled to the costs of the demurrer.

TRESPASS, for breaking and entering the plaintiff's messuage, and taking away his goods. The defendants pleaded four pleas, to one of which the plaintiff demurred. The demurrer was argued in Easter term, 1843, when the court gave judgment for the plaintiff.

At the trial of the issues at the last assizes at Stafford, the jury found a

general verdict for the plaintiff, damages 20s. : there was no certificate under the statute 3 & 4 Vict. c. 24, s. 2. (a)

*1031] *The master having declined to tax the plaintiff's costs, *Byles*, Serjt., on a former day in this term, on the part of the plaintiff, moved for a rule calling upon the defendants to show cause why the master should not tax the plaintiff's costs of the action. He submitted that the plaintiff was entitled to the costs of the issue in law, under the 4 & 5 Anne, c. 16, ss. 4, 5, (b) and 3 & 4 W. 4, c. 42, s. 34; (c) that the issue in law not being before the judge at all, he had no means of exercising a discretion, and therefore the statute 3 & 4 Vict. c. 24, s. 2, did not apply; *Taylor v. Rolf*, 13 Law J., N. S., Q. B. 39; (d) and that the plaintiff was also entitled to the costs of the other issues, though by reason of the statute 3 & 4 Vict. c. 24, s. 2, he might not be entitled to the costs of *the trial*.

Sir *T. Wilde*, Serjt., now showed cause. The rule is framed with studied *1032] ambiguity. If the plaintiff means *to confine his claim to the costs of the judgment on the demurrer, the rule is not opposed. The plaintiff will get his costs of this application if cause is shown against that to which he is clearly entitled. But he is clearly not entitled to the other costs for which he appears to ask. By the venire in this case the jury were not summoned to assess the damages on the judgment on demurrer, but only to try the issues in fact joined between the parties. The ground, therefore, upon which alone that part of the rule could have been sustained, fails; for, it is quite clear that Lord DENMAN's act deprives the plaintiff of costs as to the issues of fact.

Byles, Serjt., in support of the rule. The plaintiff being entitled to the costs of the demurrer, is entitled to the costs of the inquiry of damages. To that extent the rule must, at all events, be made absolute. [MAULE, J. The plaintiff asks for the costs of an inquiry, which would have been useless, and which never took place.]

TINDAL, C. J. The costs of the demurrer would have been allowed by the master if they had been applied for without mixing them up with the

(a) Which enacts, "that, if the plaintiff in any action of trespass, or of trespass on the case, brought or to be brought in any of her majesty's courts at Westminster, &c., shall recover by the verdict of a jury less damages than 40s., such plaintiff shall not be entitled to recover or obtain from the defendant, in respect of such verdict, any costs whatever, whether it shall be given upon any issue or issues tried, or judgment shall have passed by default, unless the judge or presiding officer before whom such verdict shall be obtained, shall, immediately afterwards, certify on the back of the record, or on the writ of trial or writ of inquiry, that the action was really brought to try a right besides the mere right to recover damages for the trespass or grievance for which the action shall have been brought, or that the trespass or grievance in respect of which the action was brought, was wilful and malicious."

(b) Section 4 enacts, that "it shall and may be lawful for any defendant or tenant in any action or suit, or for any plaintiff in replevin, in any court of record, with the leave of the same court, to plead as many several matters thereto as he shall think necessary for his defence." And by sect. 5, "if any such matter shall, upon a demurrer joined, be judged insufficient, costs shall be given, at the discretion of the court."

(c) Which enacts, that, "where judgment shall be given either for or against a plaintiff, or for or against a defendant, upon any demurrer joined in any action whatever, the party in whose favour such judgment shall be given shall also have judgment to recover his costs."

(d) Since reported, 5 Q. B. 337.

costs of the issues, to which the plaintiff is not entitled. Instead of taking this course, the plaintiff has come to the court with an application for which there is no foundation. His rule therefore ought, in strictness, to be discharged. It may, however, be made absolute to the extent of allowing him the costs of the demurrer, on payment, to the defendant, of the costs of the application.

Per curiam ;

Rule absolute accordingly.

*GRINNELL v. WELLS. Nov. 25.

[*1033

An action for seduction cannot be maintained without loss of service.

CASE, for the seduction of the plaintiff's daughter.

The declaration stated that before and at the time of committing the grievances, and from thence until the time of the pregnancy and sickness, and of the plaintiff's expending the moneys and incurring the debts, thereafter mentioned, Alice Grinnell, the daughter of the plaintiff, was a poor person who maintained herself by her labour and personal services, and, except by her labour and personal services, was not of sufficient ability to maintain herself, and was, during all that time, unmarried, and an infant under the age of twenty-one years, to wit, of the age of fourteen years, and at and during, and after the time of her pregnancy and sickness, as thereafter mentioned, and of the plaintiff's expending the moneys, and incurring the debts, thereafter mentioned, the said Alice was such poor person, infant, and unmarried, and was not of sufficient ability to maintain herself: yet the defendant, well knowing the premises, but contriving to injure the plaintiff, and to compel him to maintain the said Alice, on the 27th of May, 1841, and on divers other days, &c., debauched and carnally knew the said Alice, whereby she became pregnant and sick with child, and so continued for a long time, to wit, for the space of nine months then next following, at the expiration whereof, to wit, &c., the said Alice was delivered of the child with which she was so pregnant as aforesaid; by means of which premises the said Alice, for a long time, to wit, &c., became and was unable to work or to maintain herself, which she might, and otherwise would, have done; and the plaintiff, so being her father, and being of sufficient ability to *maintain the said Alice, was, by means of the premises, during all that time, forced and obliged to, and necessarily did, maintain the said Alice at his own charges; and also by means of the premises, the plaintiff was obliged to, and did necessarily, pay, lay out, and expend divers moneys, and incur divers debts, in the whole amounting to 50*l.*, in and about maintaining, nursing, taking care of, and curing the said Alice, and in and about her delivery, during the time she was so unable to maintain herself as aforesaid. Wherefore the plaintiff saith that he is injured and hath damage to the value of 500*l.*, &c.

Plea not guilty; whereupon issue was joined.

The cause was first tried before **ERSKINE, J.**, at the spring assizes at Gloucester in 1843, when a verdict was found for the plaintiff, damages, 300*l*. In the following term a rule nisi was obtained for a new trial on the ground of excessive damages, the declaration only pointing to expenses actually incurred by the plaintiff in his daughter's maintenance and cure, and upon affidavits impugning the character of the principal witness; and also to arrest the judgment. In Trinity term the rule was made absolute for a new trial on payment of costs, the defendant agreeing that any damages to be assessed on the second trial might be estimated agreeably to the principles applicable to ordinary actions for seduction. At the second trial, which took place before **WILLIAMS, J.**, at the Gloucester summer assizes, 1843, the jury again found a verdict for the plaintiff, damages 200*l*.

Talfourd, Serjt., (with whom was *Greaves*.) in Michaelmas term, 1843, moved in arrest of judgment. The declaration discloses no legal ground of action. This is not an action brought in the ordinary form for seduction; but for an act of incontinence committed by third persons, from which act *1035] damage is alleged to have *arisen to the plaintiff. In *Satterthwaite v. Dewhurst*, 4 Dougl. 315, (a) the court, upon a motion to arrest the judgment, held that the action would not lie unless it were laid with a *per quod servitium amisit*. The relation of master and servant has always been held a necessary ingredient in such an action. Formerly, parties declared in trespass, *per quod servitium amisit*; and a count for debauching the plaintiff's daughter might be joined with a count for breaking and entering the plaintiff's house; *Woodward v. Walton*, 2 N. R. 476. Now, however, it is, perhaps more properly, considered as an action upon the case; but it is agreed that the mere relation of parent and child without some service, does not give the father a remedy against the seducer of his daughter; *Russell v. Corne*, 2 Lord Raym. 1031, 6 Mod. 127; *Postlethwaite v. Parkes*, 3 Burr. 1878; *Bennett v. Allcott*, 2 T. R. 166; *Dean v. Peel*, 5 East, 45. In two recent cases in the Exchequer, attempts appear to have been made to relax that principle; *Harris v. Butler*, 2 M. & W. 539; *Blaymire v. Haley*, 6 M. & W. 55. In the latter case, **PARKE, B.**, referred to *Maunder v. Venn*, Moo. & M. 323, as an authority that there must be proof of service, actual or constructive. *Hall v. Hollander*, 4 B. & C. 660, 7 D. & R. 133, was an action of trespass for driving a carriage against the plaintiff's son and servant, whereby the plaintiff was deprived of his services, and was put to expense about his cure: it was held that the loss of service was the gist of the action, and that the child, (who was only two years and a half old,) being incapable of performing any service, the action was not maintainable. The common law imputes no obligation on a parent *1036] to support *his child; *Mortimore v. Wright*, 6 M. & W. 482. The 43 Eliz. c. 2, s. 7, provides "that the father and grandfather, and the mother and grandmother, and the children, of every poor, old, blind, lame, and impotent person, or other poor person not able to work, being

(a) Shortly reported *per nomen Satterthwaite v. Duerst*, 5 East, 47 n.

of a sufficient ability, shall, at their own charges, relieve and maintain every such poor person, in that manner and according to that rate as by the justices of peace of, &c., shall be assessed, upon pain that every one of them shall forfeit 20s. for every month which they fail therein.(a) But all the circumstances which constitute the breach of duty, must appear upon the record; *Gray v. Jefferies*, Cro. Eliz. 55; *Barham v. Dennis*, Cro. Eliz. 769; *Robert Mary's case*, 9 Co. Rep. 113 a. *Rex v. Cornish*, 2 B. & Ad. 498; and *Davis v. Black*, 1 Gale & D. 432, were also referred to.

A rule nisi having been granted,

Sir *T. Wilde*, Serjt., (with whom were *Channell*, Serjt., and *Godson*,) in Easter term last, showed cause. Since the new rules, the plea of not guilty in this action only puts in issue the fact of the debauching: the other averments in the declaration not traversed, must be considered as admitted in the sense in which they will maintain the action. *Spiers v. Parker*, 1 T. R. 141.(b) The father, if of ability, is, by the statute 43 Eliz. c. 2, s. 7, bound to maintain his poor child. It would seem to mark a very defective state of society, that a legislative provision should be required for the purpose of enforcing an obligation so sacred; but the statute of Elizabeth is not directed so much to the relation of parent and child as to relieve third persons from the obligation of providing *for a party whose relations [*1037 were of ability to support him. The parent might leave the burden of supporting his child to the parish, if he knew that the child *must* be provided for, with or without any exertion on his part. If a moral obligation is capable of being enforced by legal means, the party is not bound to wait until he is actually coerced; *Blyth v. Smith*, 6 Scott, N. R. 360. It is not necessary that costs should have been actually incurred in order to have a remedy over. If any doubt exists as to the necessity of showing actual coercion, the court may be relieved from considering that point in the present case, because upon this record, supposing it to be necessary, it must be presumed that an order of maintenance was made by the justices. If the words "forced and obliged to pay" will give a cause of action, what is the meaning of the words used here? [TINDAL, C. J. There is here a distinct allegation; it is not matter coming in merely by a *per quod*.] That allegation is therefore traversable. It is not like an allegation of special damage in trespass. The party is forced and obliged when under moral obligation and legal liability. In an action for running down a ship or a carriage, the declaration alleges that the plaintiff, by reason of the premises, was forced and obliged to lay out money in repairs. It cannot be doubted that the plaintiff might have been compelled to support this daughter. The record discloses every fact necessary to entitle the justices to make an order. In *Hall v. Hollander*,(c) power in the father to command the services of the child, and capacity in the child to perform the services when required, were

(a) And see 4 & 5 W. 4, c. 76, s. 56.

(b) And see *Hobson v. Middleton*, 6 B. & C. 295, 9 D. & R. 249, and 1 C. B. 787.

(c) *Supra*, 1035.

held to be sufficient. Looking at this case as arising not on demurrer, but after verdict, the plaintiff is in the same position as if an allegation of the order had been expressly traversed, and the issue *upon that traverse had been found for the plaintiff. What must the plaintiff have proved upon the traverse of that allegation? The court must intend all that the plaintiff would have been obliged to prove upon the traverse of the allegation. If the court would have said, you must go on to prove the order upon the trial of an issue upon the traverse, it must be now taken that such an order existed. The defendant must be taken to admit every fact which he does not traverse, in the same sense in which it must have been proved if traversed. [TINDAL, C. J. You say that if the statement in *Hall v. Hollander* had been as in the present declaration, the plaintiff might have recovered.] Yes; in that case BAYLEY, J., says, "In this case it was proved that the plaintiff did not necessarily incur any expense. If he had done so, I am not prepared to say that he could not have recovered upon a declaration, describing as the cause of action, *the obligation of the father to incur that expense.*" In *Hall v. Hollander* there are two or three things to be observed. The case was put on the ground of service, and no acts of service were proved. Secondly, the child was placed in an hospital, and no expense was necessarily incurred by the father. HOLROYD, J., points out some difficulties. *Satterthwaite v. Dewhurst* is a loose report, in which the cases cited have no connection with the subject. *Russell v. Corne*, although contended to be in point, only shows that an action will not lie simply for seduction. In the case of *Satterthwaite v. Dewhurst* there is, in the judgment of the court, an absence of all reference to the point now in dispute. The main question was, whether *case* would lie. It is there said that the action is brought for incontinence. That is not so. [COLTMAN, J. Lord MANSFIELD must mean that an action will not lie unless there be *damnum et injuria*.] He could not mean to say that actual pecuniary loss would not give a right *of action. Every word of the judgment must apply to a case of loss actually incurred, if it is applicable at all to the present case; *Spieres v. Parker*, 1 T. R. 141; *Dalby v. Hirst*, 1 Bro. & B. 224.

Channell, Serjt., on the same side. The justices may make an order upon the parent for relief. If this plaintiff had been summoned, he could have made no defence. In *Rippon v. Norton*, Cro. El. 849, it was contended that the plaintiff had a cause of action for the expense of curing his son who had been beaten; and it was held to be no cause of action, because it was that which he was not compellable to pay. This case stands clear of the statutes relating to illegitimate children. If the facts alleged in the declaration are such as to bring the plaintiff within the statutes, it is the same thing as if an order of justices were made and not executed. There is nothing here to exclude evidence of such an order. It must be admitted that *Satterthwaite v. Dewhurst*, as reported in 4 Dougl., which report was not published till 1831, creates some difficulty. [COLTMAN, J. Your argu

ment would apply as well to the case of a daughter of the age of forty-five, as to one of fifteen.] It is clear, that the plaintiff was bound to maintain his daughter; *Hunt v. Wotten*, T. Raym. 259. In an action on the case for a nuisance, in stopping up a way, it is not necessary to show that actual damage has been sustained.

Talfourd, Serjt., in support of the rule. This declaration discloses no cause of action. If the action can be sustained on the ground suggested, it is surprising that it should be now brought for the first time. The plaintiff assumes that the act charged is wrongful as against *him*. That, however, is a fallacy, considering the *numerous cases in which it would [*1040 have been available. It is an act punishable in the ecclesiastical courts. It is an immoral act, but not an act wrongful in the sense necessary to found an action at law for the consequences. In all of the cases, the ground of the action has been considered to be the violation of the relation of master and servant. *Postlethwaite v. Parkes*, 3 Burr. 1878; *Deun v. Peel*, 5 East, 45; *Speight v. Oliviera*, Stark. N. P. C. 493; *Harris v. Butts*, 2 M. & W. 539; *Blamere v. Hayley*, 6 M. & W. 155. In *Hunt v. Wotten* there was an actual trespass. The court of Exchequer have in the most emphatic manner decided this point in *Mortimer v. Wright*, 6 M. & W. 482. With regard to the statute of Elizabeth, it is not consistent with the declaration that an order of justices should have been made. The allegation is, that the plaintiff was, *by reason of the premises*—that is, by means of the pregnancy and sickness, and not by means of an order of justices—forced and obliged to maintain his daughter. This declaration is defective; first, because it shows no relation of master and servant; secondly, because supposing the relation to exist, there is no legal damage, inasmuch as the act complained of must be taken to be the voluntary act of the servant.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court. The question in this case arises upon a motion in arrest of judgment, and is this—whether a father can maintain an action upon the case for the seduction of his daughter, where he is unable to allege in the declaration the loss of her service by reason of the defendant's wrongful act.

The declaration in this case contains no allegation of the loss of the service of the daughter, but, instead *thereof, alleges that the [*1041 daughter was a poor person, maintaining herself by her labour and personal services, and not of sufficient ability to maintain herself otherwise; and, after stating that the defendant debauched her, and that she was delivered of a child, and her thereby becoming unable to work or maintain herself, alleges, as the gravamen of the plaintiff, that he, being her father, and being of sufficient ability to maintain his said daughter, was, by means of the premises, forced and obliged to, and necessarily did, maintain his said daughter, at his own charges, and did necessarily pay large divers money, and incur divers debts in and about the maintaining and nursing, &c., of his said daughter, during the time she was unable to maintain her-

self. And the question arises—whether the want of the allegation of the loss of service is supplied by the substitution of the before-recited allegation.

The foundation of the action by a father to recover damages against the wrongdoer for the seduction of his daughter, has been uniformly placed, from the earliest time hitherto, not upon the seduction itself, which is the wrongful act of the defendant, but upon the loss of service of the daughter, in which service he is supposed to have a legal right or interest. Such is the language of Lord Holt in *Russell v. Corne*, and such the opinion of the court in the earlier case of *Gray v. Jefferies*, with reference to an action by a father for a personal injury to a child, which stands precisely on the same footing. See also *Randle v. Deane*, 2 Lutw. 1497. It has, therefore, always been held that the loss of service must be alleged in the declaration, and that loss of service must be proved at the trial, or the plaintiff must fail. See *Bennett v. Alcott*. It is the invasion of the legal right of the master to the services of his servant, that gives him the right of action *1042] for beating his servant; and it is the *invasion of the same legal right, and no other, which gives the father the right of action against the seducer of his daughter. This distinction is most clearly and pointedly put by the court in *Robert Mary's* case, where it is said, “If my servant be beaten, the master shall not have an action for this beating, unless the battery is so great that by reason thereof he loses the service of his servant; but the servant himself for every small battery shall have an action: and the reason of the difference is, that the master has not any damage by the personal beating of his servant, but by reason of a *per quod*, viz., *per quod servitium amisit*; so that the original act is not the cause of his action, but the consequent upon it, viz., the loss of the service, is the cause of his action.”

No precedent in an action for seduction has been brought before us, (except those in *Harris v. Butler* and *Blaymire v. Hayley*, in both of which cases the declarations were held bad,) in which there has not been an allegation of the loss of service to the father: and the struggle has always been at the trial, to give some proof either of actual service or of the implied relation of master and servant. And in the case of *Dean v. Peel*, where the loss of service was alleged in the declaration, but where the proof at the trial was only this, that the daughter was in the service of another person at the time of the seduction without any intention of returning to her father's house; but that, upon her seduction, she came home and was maintained by her father during her illness, the action was notwithstanding held not to be maintainable. Now, that case is, in evidence, precisely what the present case is in pleading upon the record; and therefore it affords a direct authority for the position, that, where there is the absence of any allegation of the loss of service to the father, although there may be an allegation of his being compelled to pay the expenses arising from the wrongful act, the *1043] *action is nevertheless not maintainable. Upon the ground of action, therefore, set forth upon this record, we do not feel our-

selves warranted in giving judgment for the plaintiff; as we think the declaration discloses no legal wrong to the plaintiff, no invasion or violation of his legal rights.

Many observations suggest themselves against the soundness of the argument upon which the plaintiff relies.

In the first place, if the liability to support the daughter under the statute of Elizabeth, would form a ground of action, *per se*, independently of any service, it would seem scarcely credible,—as that statute was passed long before any of the cases above referred to,—that the difficulty of proof of service, either actual or implied, which has occurred in so many cases, should not have been avoided and answered by framing the declaration,—like the present,—upon the legal liability of the father to maintain his daughter under the statute.

In the next place, if this ground of action is available in the case of seduction of a daughter, it is equally so in the case of every beating of a son, whether his service be lost or not; and, upon this supposition, the beating of a son, at whatever advanced age, and although altogether emancipated from his father's family, would form a ground of action at the suit of the father, if called upon, under the statute, to maintain his son.

And, still further, this anomaly would follow, that, as the father is only liable, under the statute, to maintain his daughter where he is of sufficient ability so to do, and as the damages recoverable by the father, when he brings the action, are, confessedly, not limited to the actual expenditure of his money, but may be given according to the circumstances of aggravation in the particular case, the right of action to recover compensation would be confined to persons of ability to maintain the daughter, and would be denied to the poorer orders of the community—a result that [*1044] would be most unreasonable. (a)

We therefore think, for the reasons above given, the cause of action, as stated on this record, is insufficient, and that the rule for arresting the judgment must be made absolute.

Rule absolute.

(a) It may be observed, however, that the *quasi* fiction of *servitium amisit* affords protection to the rich man, whose daughter occasionally makes his tea, but leaves without redress the poor man, whose child, as here, is sent, unprotected, to earn her bread amongst strangers.



JOSEPH CHARLES HOWETT v. BENJAMIN CLEMENTS.

BENJAMIN CLEMENTS v. JOSEPH CHARLES HOWETT. *Nbv.* 23.

Where an arbitrator made an award describing the plaintiff by a wrong Christian name, the court sent it back to him for correction, under a clause contained in the order of reference, empowering the court to refer the award back for amendment.

By an order of *nisi prius*, dated the 27th of November, 1843, made in a cause of *Howett v. Clements*, a verdict was ordered to be entered for the plaintiff, damages 500*l.*, subject to the award of a barrister, who was

thereby empowered to direct that a verdict should be entered for the plaintiff or the defendant as he should think proper, and to whom the cause, and also a certain other cause of *Clements v. Howett*, and all matters in difference between the parties, were referred—the costs of the said suits respectively to abide the event of the award, and the costs of the reference and award to be in the discretion of the arbitrator. The order contained a clause empowering the court to refer back the award to the arbitrator for amendment.

*1045] The award of the arbitrator, made on the 1st of May, *1844, was as follows:—"With respect to the cause first above mentioned, and in which the said James Charles Howett is the plaintiff and the said Benjamin Clements is defendant, I award, order, and adjudge that the verdict already entered up therein for the plaintiff James Charles Howett, shall stand, but that the damages shall be reduced to the sum of 45*l.*; and, with respect to the other cause, in which the said Benjamin Clements is the plaintiff, and the said James Charles Howett is defendant, I award, order, and adjudge that a verdict shall be entered for the defendant James Charles Howett; and I find that there are no further or other matters in difference between the said parties besides or in addition to the said causes in the said order of reference and hereinbefore mentioned: and I further order and award that the costs of this reference and of this my award shall be paid by the said Benjamin Clements."

Talfourd, Serjt., on a former day in this term, obtained a rule calling upon Clements to show cause why the *postea* in the first-mentioned cause should not be delivered to the plaintiff, and why judgment should not be entered in both causes pursuant to the award, or why the matter should not be referred back to the arbitrator to amend his award by correcting the error made in the Christian name of the plaintiff Howett. His affidavit stated that the mistake arose in copying the award.

Sir *T. Wilde*, Serjt., now showed cause. There has been no award made in the causes referred; and consequently the court has no power to enter up judgment in the manner prayed. It is by no means an uncommon occurrence for a judgment to be signed as for want of a plea, where a plea has been delivered with a wrong Christian name of one of the parties. The *1046] mistake *cannot be corrected by any evidence offered by the parties, for it is not competent for the court to enter a nonsuit for Joseph on an award made in favour of James, and no instance can be found in which the court has assumed such an authority. Secondly, the award not being an award made in the causes referred, the court cannot send it back for amendment. The objection is, undoubtedly, *strictissimi juris*, but a departure from the strict rule may lead to serious consequences.

Talfourd, Serjt., *contra*, was not called upon.

TINDAL, C. J. The clause empowering the court to refer back the award to the arbitrator for amendment, must be construed with some degree of liberality. The affidavit shows that the award was intended as an award

made in the causes referred under the order of nisi prius. Let it go back to the arbitrator to be amended.

The rest of the court concurred.

Rule "that the award of the arbitrator in the said rule [the rule nisi] mentioned be referred back to the said arbitrator, to reconsider and amend the same, if he shall think fit." (a)

(a) On the matter going back to the arbitrator, he not only corrected the misnomer, but made a substantial alteration in the award. See *Howett v. Clements*, 1 C. B. 128.

*DOE dem. CALDECOTT v. JOHNSON. Nov. 25. [*1047

A. devised a messuage, &c., to B. and his assigns, for life, and, from and after his decease, to the use of all or such one or more of the child or children of B. lawfully to be begotten, to commence and take effect at such times and in such shares, manner and form, and for such estates and interests, and subject to such payments, conditions and limitations, as P., by any deed or writing, or by his last will, &c., should direct, limit, appoint, &c., and, for want of such appointment, to the use of all and every the son and sons, daughter and daughters of B., as tenants in common in tail, with cross-remainders, and for want of such issue to C. in tail.

B., by his will, gave, devised, and bequeathed all his real and personal estate to trustees, on trust to pay and apply the clear yearly rents and profits of his real estate as follows—one third to his wife for life, if she should so long continue his widow, and the other two thirds unto and for the benefit of his three sons in equal shares and proportions, and to be paid and applied to and for their benefit and advantage, or the benefit and advantage of the survivors or survivor of them, and the issue of such of them as should die leaving lawful issue, in such manner as the trustees or the survivor of them should think proper; and, in case two of his said sons should die without leaving issue, then he gave and devised his real estate to the surviving son, his heirs and assigns for ever:—

Held, that this will was not a good execution of the power, inasmuch as it contained no reference to the power, or to the property that was the subject of the power, or to any thing from which it could naturally be inferred that B., in framing his will, had the power in his contemplation.

No evidence was given at the trial, by either party, as to whether or not B. possessed any other real estate upon which his devise could operate:—

Held, that the *onus probandi* rested upon the party setting up the will as an execution of the power, and that it lay upon him to establish the negative proposition that B. possessed no such property.

EJECTMENT, for a messuage and other hereditaments at Nantwich, in Cheshire, which John Caldecott, the lessor of the plaintiff, claimed, as issue in tail of his grandmother Amy, under a limitation contained in the will of Michael Mason, of Bickley.

At the trial of the cause before WILLIAMS, J., at the last spring assizes at Chester, it appeared that Michael Mason, of Bickley, died in 1782, leaving two sons, John and Michael, and two daughters, Amy and Elizabeth. By his will, dated the 13th of June, 1778, after charging the premises in question with certain legacies, he devised as follows:—"And, subject and charged as aforesaid, I give and devise my said messuage or dwelling-house, hereditaments and premises at Nantwich aforesaid, unto my son Michael Mason and his assigns, for and during his natural life; and from and after his decease, to the use and behoof of all or such one or more of the child or children of my said son Michael lawfully to be begotten, to commence and take effect at such times and in such shares, [*1048

manner and form, and for such estates and interests therein, and subject to such payments, conditions and limitations, *as my said son Michael, by any deed or deeds, writing or writings, or by his last will and testament in writing, to be by him duly signed, executed and published, in the presence of, and attested by, three or more credible witnesses, shall direct, limit, appoint, will, devise, settle, or charge the same*; and, for want of such settlement, will, or appointment, to the use of all and every the son and sons, daughter and daughters, of my said son Michael lawfully to be begotten, equally to be divided between them (if more than one) as tenants in common, and to the heirs of the body and bodies of all and every such son and sons, daughter and daughters, respectively lawfully issuing; and, for want of issue of any such son or sons, daughter or daughters, to the use of the other and others of such son and sons, daughter and daughters in like manner, as tenants in common, and to the heirs of the body and bodies of such other son or sons, daughter or daughters, lawfully issuing; and, for default of issue of all such son or sons, daughter or daughters, save one, to the use of such one son or daughter, and the heirs of his or her body lawfully issuing; and, for want of such issue, then on trust that my said executors do and shall permit and suffer my said daughter Amy to receive and take the rents and profits of the said premises to and for her own sole and peculiar use and benefit for and *1049]

use and behoof of all or such one or more of the child or children of my said daughter Amy, lawfully to be begotten, to commence and take effect at such times, and in such shares, manner, and form, and for such estates and interest therein, and subject to such payments, conditions, and limitations, *as my said daughter Amy, by any deed or deeds, writing or writings, or by her last will and testament in writing to be by her (notwithstanding her coverture) duly signed, executed, and published in the presence of and attested by three or more credible witnesses, shall direct, limit, appoint, will, devise, settle or charge the same*; and, for want of such settlement, will, or appointment, to the use of all and every the son and sons, daughter and daughters, of my said daughter Amy, lawfully to be begotten, equally to be divided between them (if more than one) as tenants in common, and to the heirs of the body and bodies of all and every such son and sons, daughter and daughters, respectively, lawfully issuing; and, for want of issue of any such son or sons, daughter or daughters, to the use of the other and others of such son and sons, daughter and daughters, in like manner, as tenants in common, and to the heirs of the body and bodies of such other son or sons, daughter or daughters, lawfully issuing; and, for default of issue of all such son or sons, daughter or daughters, save one, then to the use of such one son or daughter, and the heirs of his or her body lawfully issuing; and, for want of such issue, to the use and behoof of my said son John Mason, his heirs and assigns for ever."

John Mason, the eldest son of the testator, survived him, and died without issue, and unmarried.

Michael Mason, the second son, entered upon the premises at the death of his father, and continued in possession until his death in 1822. By his will, *bearing date the 28th of March, 1796, in which he described himself as "Michael Mason, of Nantwich, hatter," he devised, [*1050 amongst other things, as follows: "I direct that all my just debts and funeral expenses be paid out of my personal estate; and, subject thereto, I give and bequeath *all my real and personal estate* whatsoever and wheresoever, and of what nature and kind soever, unto my brother John Mason, of Nantwich aforesaid, and my nephew, Thomas Caldecott, and to the survivor of them, his heirs, executors, administrators and assigns, upon the several trusts, and to and for the several ends, intents, and purposes hereinafter mentioned, that is to say, in trust to pay and apply the clear yearly rents and profits of my real estate in manner following, viz., *one third part thereof unto my wife Sarah Mason, and her assigns, for and during the term of her natural life, if she shall so long continue my widow*, and the other two third parts thereof unto and for the benefit of my three children, Thomas, John, and Michael, in equal shares and proportions, and to be paid and applied to and for their benefit and advantage, or the benefit and advantage of the survivors and survivor of them, and the issue of such of them as shall happen to die leaving issue lawfully begotten, in such manner as my said trustees, or the survivor of them, shall think proper; and, in case two of my said sons shall happen to die without leaving any issue lawfully begotten, then I do hereby give and devise my real estate unto the survivor of my said three sons, his heirs and assigns for ever."

Thomas Mason, the son of Michael Mason, of Nantwich, enjoyed the premises until his death, which took place on 31st of March, 1842. The other two sons died without issue and unmarried.

The lessor of the plaintiff was the grandson of Amy, the daughter of Michael Mason, of Bickley, to whom *the second estate for life was given by his will. The defendant claimed the premises as devisee of Thomas Mason. [*1051

On the part of the plaintiff, it was contended that the will of Michael Mason of Nantwich was not a good execution of the power reserved to him by the will of his father, Michael Mason of Bickley, as the will neither referred to the power nor to the property which was to be affected by the power, and there was nothing upon the face of the will to show that it was intended as an execution of the power.

No evidence was given by either side to show whether or not the testator Michael Mason, of Nantwich, at the time of his death, had any other real property on which the devise could take effect.

A verdict was found for the defendant, leave being reserved to the lessor of the plaintiff to move to enter the verdict for the plaintiff, if the court should be of opinion that there was no sufficient execution of the power.

Talfourd, Serjt., having, in Easter term last, obtained a rule nisi accordingly,

Sir *Thomas Wilde* and *Channell*, Serjts., (with whom was *Welsby*,) now showed cause. The first objection on the part of the lessor of the plaintiff is, that inasmuch as the will does not refer to the power, it cannot be treated as an execution thereof. As, however, no evidence was given at the trial that the testator Michael Mason of Nantwich possessed other property, it must now be taken that he had none except the premises to which the power of appointment applied. A party who asserts the affirmative ought to prove it; and, consequently, at the trial, the *onus* lay on the plaintiff to show that the testator had other property to which the will could apply. Assuming, therefore, that there was no other property on which the will could operate, the presumption of law is, that the will was intended to be an execution of the power, for otherwise it would totally fail in effect. The other side would also contend that the will was not a good execution of the power, inasmuch as the power is to be exercised only in favour of children, whereas the testator, as to one-third of the estate, gives it to his widow. Conceding that this disposition as to the one-third was not justified by the terms of the power, the only effect will be that the appointment is void *quoad* that one-third, and good as to the residue; Sir *Edward Clere's* case, 6 Co. Rep. 17 b; (a) and that the estates given to the sons would vest immediately, and as to the part not properly appointed, they would take it under their grandfather's will. In Sugden on Powers, speaking of excess in the execution of powers, (6th edit. vol. ii. p. 80,) it is said: "Where there is a complete execution, and something *ex abundanti* added which is improper, there the execution shall be good, and only the excess void; but where there is not a complete execution of a power, and the boundaries between the excess and execution are not distinguishable, it will be bad." And *Campbell v. Leuch*, Ambler, 740, is cited, where, under a power of leasing for twenty-one years, a lease for twenty-six years was granted, and it was holden to be void only for the excess. At all events, no argument can be founded on the gift to the wife, as showing that Michael Mason the son was not intending to exercise his power; for there are words in the power which might well lead him to the conclusion that it authorized him to provide for her. The disposition of the courts is to uphold the execution of powers, if circumstances will admit of that being done. Here, there is no evidence of the party having any other property on which the will can operate; and he deals with the premises in question precisely as he is empowered to do, with the exception, perhaps, of the gift to his wife; and as to that, it is not so inconsistent with the power as to lead to the inference that he was not intending to exercise his power. Although, in some respects, informal, the will is substantially an execution of the power, so as to enable the court to see that he must have meant it as an exercise thereof.

Talfourd, Serjt., (with whom was *E. V. Williams*,) in support of the rule. It is clear that the will of Michael Mason, of Nantwich, was not a good

execution of the power contained in his father's will. All the cases show that no power can be well executed, unless the instrument, expressly or impliedly, refers to the power, or it is executed under circumstances showing that the party contemplated an exercise of the power. Those who seek to set up a will or other writing as an execution of a power, are bound to show that it *must* have been intended by the donee as an execution of the power. It is not sufficient to establish a strong probability; there must be a moral certainty that the party meant to execute the power. In *Brudley v. Westcott*, 13 Ves. 453, PLUMER, M. R., says, "the distinction is perhaps slight which exists between a gift for life, with a power of disposition super-added, and a gift to a person indefinitely, with a superadded power to dispose by deed or will. But that distinction is perfectly established, that in the latter case the property vests. A gift to A., and to such person as he shall appoint, is absolute property in A., without an appointment: but, if it is to him for life, and after his death to such person as he shall appoint by will, he must make an appointment, in order to entitle that person to any thing. If that distinction exists, it is impossible that the [*1054 power can be executed by the very words by which property is given." Here, there was no necessity for an execution of the power in order to secure the estate to the children; for in default of any appointment, the sons of the testator would take under the grandfather's will as tenants in tail, with cross-remainders between them. No case can be cited in which a will has been held to be an execution of a power, where it neither professes to be so, nor contains any reference to the property, and there is an entire absence of proof that it will be inoperative, unless taken to be an execution of the power. In *Nunnock v. Horton*, 7 Ves. 391, a power of appointment was held not to be executed by a will having no reference to the power or to the subject of it. Lord ELDON there says: "I am not sure the rule does not oblige the court to act against what probably might have been the intention nine times in ten. There is not in this will any reference whatsoever to the power; nothing having a necessary reference to it, or that can be stated as having any reference, except the words 'Three per cent. consolidated bank stock.' That sum is so given that it cannot be disputed, that, if, when he died, he had not any stock, but had other personal estate, that stock must have been purchased for the legatees. It is not specific. It would operate only as a direction to purchase stock, if he died without any stock; and it is very difficult to say that what would amount to that direction in a will, is to be construed into a gift of that which was not his to give, but over which he had a power. With respect to the case put in the argument, of Black-acre in Middlesex, there is a great difference between real and personal estate. Every gift of land,^(a) —even a general residuary devise,—is specific. Only that to which the party is entitled at the *time can pass. But, as to personal estate, [*1055 he may give that which he has not, and never may have; and, at

(a) In wills made before 1838.

all events, whatever he may happen to have at his death, will pass. He might have had stock before he died, though he might have had none at the date of the codicil. But, if he never had any, yet the terms of this bequest would be satisfied, calling for this construction, that the executors must buy it after his decease." Here, the defendant seeks to give an effect to this will which, *prima facie*, does not belong to it; and therefore the *onus* is cast upon him to show that the testator had no other property. No case can be found in which it has been held that, where there is a general devise of all the testator's real estate, without any reference to any power, the want of evidence as to the existence of other property besides that which is the subject of the power should lead the court to the inference that the devise is intended to be an exercise of the power. Here, the variation between the terms of the power and the alleged appointment, raises a presumption against its being meant as an execution of the power, which the other side is bound to rebut. In *Denn d. Nowell v. Roake*, 2 Bingh. 497, 10 J. B. Moore, 113, a deviser, being seised of a moiety of certain lands in Surrey—having, by her own creation, a power of appointment over the other moiety, which she had purchased of her nephew, who succeeded her sister in the possession of it, *and having no other real estate*—devised all her freehold estate in Surrey, to J. R., on condition that out of the rents and profits he should keep the whole in tenantable repair, and under limitations framed to keep the property as long in her family as possible. This court, after reviewing all the authorities from Sir *Edward Clere's* case, 6 Co. Rep. 17 b, downwards, held that the devise was, under the circumstances, a sufficient execution of the power, and that both moieties *1056] passed under it to J. R. That judgment, however, was reversed by the court of King's Bench,^(a) and the latter judgment was affirmed by the House of Lords.^(b) In delivering the opinion of the judges in the House of Lords, ALEXANDER, C. B., said: "There are many cases upon this subject, and there is hardly any subject upon which the principles appear to have been stated with more uniformity, or acted upon with more constancy. They begin with Sir *Edward Clere's* case, in the reign of Queen Elizabeth, to be found in the 6th Report, 17 b, and are continued down to the present time; and I may venture to say that in no instance has a power or authority been considered as executed, unless by some reference to the power or authority, or to the property which was the subject of it, or unless the provision made by the person intrusted with the power would have been ineffectual, and would have had nothing to operate upon, except it were considered as an execution of such power or authority. In this case there is no reference to the subject of the power, and there is sufficient estate to answer the devise without calling in the aid of the undivided moiety now in question. All the words are satisfied by the undivided moiety of which she was the owner in fee." So, here, there is no reference to the power, or to the subject of the power; and, for any thing that appears

(a) See 5 B. & C. 720, 8 D. & R. 514.

(b) See 6 Bingh. 475.

to the contrary, there may be a sufficient estate to answer the devise without calling in aid the property in question. Every presumption is against this being intended as an execution of the power. The power clearly contemplates the giving of the whole estate to the children, and does not contemplate the giving of any interest to any one else, or the intervention of trustees.

Cur. adv. vult. [*1057]

*TINDAL, C. J., now delivered the judgment of the court.

This was a motion to set aside a verdict for the defendant, and to enter a verdict for the plaintiff, pursuant to leave reserved for that purpose, or for a new trial.

The matter in law, in reference to which the leave to enter a verdict had been granted, turned on the question, whether a power given by the will of Michael Mason, of Bickley, had been duly executed by the will of Michael Mason, of Nantwich, under the following circumstances:—Michael Mason, of Bickley, by his will, gave and devised his messuage in Nantwich to his son Michael Mason, and his assigns, for life, and, from and after his decease, to the use of all or such one or more of the child or children of his said son Michael, lawfully to be begotten, to commence and take effect at such times and in such shares, manner, and form, and for such estates and interests therein, and subject to such payments, conditions, and limitations, as his said son Michael, by any deed or writing, or by his last will and testament in writing, signed and attested as therein mentioned, should direct, limit, appoint, will, devise, settle, or charge the same; and for want of such settlement, will, or appointment, to the use of all and every the son and sons, daughter and daughters, of his said son Michael, lawfully to be begotten, equally to be divided between them, if more than one, as tenants in common, and to the heirs of the body and bodies of all and every such son and sons, daughter and daughters, respectively, lawfully issuing; and, for want of issue of any such son or sons, daughter or daughters, to the use of the other and others of such son and sons, daughter and daughters, in like manner, as tenants in common, and to the heirs of the body and bodies of such other son or sons, daughter or daughters, lawfully issuing; and, for default of issue of all such son or sons, *daughter or daughters, save one, to the use of such one son or daughter, and the heirs of his or her body, lawfully issuing; and, for want of such issue, on certain trusts for the benefit of his daughter Amy for her life, and, after her decease, to her children, for such estates as she should appoint, and, in default of appointment, to her children in tail; and, for want of such issue, to the use and behoof of his son John Mason, his heirs and assigns, for ever.

[*1058]

Michael Mason, of Nantwich, the son of the said Michael Mason, of Bickley, by his will, gave, devised, and bequeathed all his real and personal estate whatsoever and wheresoever, and of what nature or kind soever, to his brother, John Mason of Nantwich, and his nephew, Thomas Caldecott, and the survivor of them, his heirs, executors, administrators, and assigns, in trust to pay and apply the clear yearly rents and profits of his

real estate in manner following,—viz., one third part thereof unto his wife, Sarah Mason, and her assigns, for life, if she should so long continue his widow, and the other two third parts thereof unto, and for the benefit of, his three children, Thomas, John, and Michael, in equal shares and proportions, and to be paid and applied to, and for, their benefit and advantage, or the benefit and advantage of the survivors or survivor of them, and the issue of such of them as should happen to die leaving issue lawfully begotten, in such manner as his said trustees, or the survivor of them, should think proper; and, in case two of his said sons should happen to die without leaving any issue lawfully begotten, then he gave and devised his real estate to the survivor of his three sons, his heirs and assigns, for ever.

In determining whether the latter of these wills, that of Michael Mason, of Nantwich, is to be considered as an execution of the power created by *1059] the will of Michael *Mason, of Bickley, the rule which ought to guide our decision is that laid down by the judges in the House of Lords in the case of *Denn d. Nowell v. Roake*, 6 Bing. 475. It was there said by Lord Chief Baron ALEXANDER, in delivering the opinion of the judges: "There are many cases on this subject, and there is hardly any subject upon which the principles appear to have been stated with more uniformity or acted upon with more constancy. They begin with Sir *Edward Clere's* case in the reign of Queen Elizabeth, to be found in the 6th Report, (fo. 17 b,) and are continued down to the present time: and, I may venture to say, in no instance has a power or authority been considered as executed, unless by some reference to the power or authority, or to the property which was the subject of it, or unless the provision made by the person intrusted with the power would have been ineffectual,—would have had nothing to operate upon,—except it were considered as an execution of such power or authority." Now, applying these principles to the present case, there is certainly no express reference in the will of Michael Mason, of Nantwich, to the power; nor, if we look at the nature of the devise, does it necessarily, or even naturally, imply that he had the power in contemplation, in framing his will; but the contrary is rather to be inferred, the power being, to appoint to his children, and the devise being, to trustees for the benefit, as to one third part of the property, of his wife—a mode of disposition, as it appears to us, quite at variance with the power, and seeming to show that his intention in that devise was, to deal with property of which he was the absolute owner. Neither is there any express reference to the property which is the subject of the power, or any thing on the face of the will to raise any necessary implication, that, in penning the devise, he had that property in *1060] contemplation; for, the devisee is perfectly general, and the disposition is such as he had no right to make of the property in question.

Whether the testator had any other real property on which the devise in question could operate, is a matter on which it is admitted that no evidence was given on either side: and it was contended on behalf of the defendant.

that, if Michael Mason, of Nantwich, had no other real property than the house in Nantwich, so that the devise as to the real property would be wholly inoperative, unless it could operate as an execution of the power, it must be held so to operate; and that the defendant ought not to be called upon to prove negatively that Michael Mason of Nantwich had no other property, but that it lay on the plaintiff to prove, affirmatively, that Michael Mason of Nantwich *had* other property on which the devise could operate; the existence of which, in the absence of any proof, was not to be presumed.

But it appears to us, that, where a party seeks, from extrinsic circumstances, to give an effect to an instrument which, on the face of it, it would not have, it is incumbent on him to prove those circumstances, though involving the proof of a negative; for, in the absence of extrinsic proof, the deed must have its natural operation, and no other. In the present case, the devise purports only to convey the property of the devisor, not that over which he has a power of appointment; and, in the absence of proof of extrinsic circumstances, it cannot be construed to operate in any other way than that which its terms naturally import.

On these grounds, we are of opinion, that the will of Michael Mason of Nantwich cannot be considered as an execution of the power: and the consequence will be that the verdict must be entered for the plaintiff.

Rule absolute accordingly.(a)

(a) *Hughes v. Turner*, 3 Mylne & Keen, 666.

*ALEXANDER and Another v. BURCHFIELD.(a) [*1061

June 4, 1842.

The holder of a check is, in general, bound to present it for payment not later than the day following that on which he receives it, whether the presentment is made by himself or through his bankers.

But the time for presentment may be extended by the assent of the drawer, express or implied.

ASSUMPSIT, on a check drawn by the defendant, on Young & Son, bankers, Smithfield, and duly presented for payment, which was refused.

Plea, traversing the due presentment.

At the trial, before TINDAL, C. J., at the sittings at Guildhall, after Michaelmas term, 1840, it appeared that at an auction held in Chiswell Street, on the 10th of March, 1840, the defendant bought two horses, the property of the plaintiffs. The plaintiffs' witnesses stated, that upon the horses being knocked down to the defendant, about half-past four in the afternoon, the defendant tendered to the auctioneer, who is one of the above plaintiffs, the check in question; that the auctioneer objecting to receive a check so late in the day, the defendant said, "Cross it with your bankers' names, and pay it in to-morrow; and it will be all right;" that the auc-

(a) Accidentally omitted in Vol. IV.

ioneer crossed the check accordingly, and the defendant took away the horses, the sale continuing for some hours longer. The defendant's witnesses stated that the horses were bought about two, and that the defendant dined at home at half-past two, and sent his son and a servant with a delivery-order at three, to fetch the horses, and that the horses were at the defendant's stable by a quarter-past three; and they denied that the alleged conversation took place.

*1062] The plaintiffs paid in the check to their bankers, *Whitmore, Wells, & Co., on the 11th of March; and on the 12th it was presented at Young & Son's, who had stopped payment that morning. The course of business with regard to checks drawn upon bankers not using the "clearing-house," is to present them for payment on the day following that on which they are paid in by the customer. It was also proved that Young & Son did not use the clearing-house, and that they had sufficient funds of the defendant's to pay the check.

The defendant contended that the plaintiffs were bound to present the check on the day following that on which they received it. To which it was answered by the plaintiffs, that a banker is not bound to present a check for payment until the day following that on which it is paid in; and also that the circumstances under which (according to the testimony of the plaintiffs' witnesses) the check in question was given, justified delaying the presentment until the 12th.

The learned judge told the jury, that if they believed that the conversation sworn to by the plaintiffs' witnesses had really taken place, he was of opinion that presentment on the 11th had been dispensed with, but otherwise he inclined to think that the presentment was too late, but that he would reserve the point for the opinion of the court. The jury having returned a verdict for the defendant,

Sir T. Wilde, S. G., in the following term, obtained a rule nisi to enter a verdict for the plaintiffs, on the ground that the presentment was in due time; for which he cited *Boehm v. Stirling*, 7 T. R. 430; *Haynes v. Birks*, 3 B. & P. 599; *Scott v. Lifford*, 9 East, 347, 2 Campb. 246; *Langdale v. Trimmer*, 15 East, 291; *Bray v. Hadwen*, 5 M. & S. 68; *Down* *1063] *v. Halling*, 4 B. & C. 330, 6 D. & R. 455; *Roscoe on Bills*, 158, (a) or for a new trial on the ground of dispensation.

Channell, Serjt., in Michaelmas term, 1841, showed cause. The rule has long been well understood and acted upon, that the party who receives a check is bound to present it for payment within the hours of banking business on the day succeeding that on which it is issued. The holder cannot

(a) It is there said, "Where a check is delivered to the banker of the holder for the purpose of obtaining payment, the banker has the same time to present it as a fresh holder would have had,—viz., the whole of the business hours of the day next after that on which he receives it." Here, it is assumed that a fresh holder would have another day, and it is inferred that the banker of the original holder would have the same time as a fresh holder. The objection is not to the inference, but to the assumption,—to the soundness of the premises, not the legitimacy of the conclusion.

enlarge the risk of the drawer by paying it to a third person. *Rickford v. Ridge*, 2 Campb. 539; *Boddington v. Schlenker*, 5 B. & Ad. 752, 1 N. & M. 540; *Maule v. Brown*, 4 N. C. 266, 5 Scott, 694; *Down v. Halling*. Bankers are allowed a day for giving notice of dishonour, as if they held as endorsees and not merely as agents; but this extension of time has never been allowed in the case of a check.^(a) No authority is cited for the rule laid down by Mr. Roscoe.

As to the application for a new trial, it is enough to say that this was a case of conflicting evidence, which the jury have weighed, and upon which they have decided.

Sir *T. Wilde*, Serjt., in support of the rule. Checks on bankers are to be presented in a reasonable time, and reasonable time for such presentment has been *held to be the day following that on which they [1064] are received. But the convenience of business has, it is submitted, in fact and of necessity, introduced a relaxation of the general rule. The question is one of the greatest importance, looking at the vast extent to which checks are presented for payment through bankers, and the relief which the modern usage of paying bills and checks through exchanges effected at the clearing-house, affords to the currency of the country. The practice of passing checks through bankers is also a great protection against forgery. *Down v. Halling* does not apply to the present case. In *Maule v. Brown* the bankers lost a day by sending the check to another branch of their own establishment. Presentment of a check to the drawee stands upon much the same footing as notice of the dishonour of a bill or note, in respect of which *reasonable diligence* is all that is required. *Haynes v. Birks*.

Should the court be of opinion that the plaintiff is not entitled to have the verdict entered for him, the state of the evidence leaves the facts so doubtful as reasonably to require the taking of the opinion of another jury.

Cur. adv. vult

TINDAL, C. J., now delivered the judgment of the court. This case was brought before us on a rule obtained upon two grounds—first, for a new trial, as against evidence—secondly, for a misdirection.

The question of fact which was disputed between the parties, arose upon the contradictory evidence at the trial, as to the circumstances attending the delivery of the check, on which this action was brought; the plaintiffs' witnesses asserting that, shortly before five o'clock in the afternoon, the defendant in person paid the check to the plaintiffs, and proposed, on an objection made by the plaintiffs against receiving the check *at so [1065] late an hour, that it should be crossed with the names of the plaintiffs' bankers, and paid into them on the following day; and that thereupon the horses, in payment for which the check was given, were delivered to

(a) Whether the transferee is the banker of the transferor or a stranger, the additional day is allowed upon a bill or note, and according to the decision in this case, not upon a check.

the defendant himself, who took them away; the defendant's witnesses, on the contrary, stated that the defendant returned from the sale before half-past two, having already paid the check for the horses, and bringing with him the delivery-order; that his son went for the horses at a quarter-past three, with the delivery-order which he had received from his father; and that the plaintiff's son delivered the two horses to the defendant's son, on receiving such orders. The two accounts are perfectly irreconcilable; and the jury, after the discrepancies had been pointed out to them, felt themselves justified in giving credit to the defendant's witnesses: and we cannot take upon ourselves to say they were wrong.

The second point is a point of law, which arose upon the last plea; that plea alleges that the check was not presented by the plaintiffs for payment within due and reasonable time; on which issue is joined. And as to this point the facts proved at the trial were, that the check was paid by the defendant to the plaintiffs in the afternoon of Tuesday, the 10th March; that on Wednesday morning the plaintiffs paid it into their bankers, Whitmore & Co., who presented it for payment on the morning of Thursday, the 12th, to the defendant's bankers on whom it was drawn; that if the check had been presented on the Wednesday during banking hours, it would have been paid; but that the defendant's bankers stopped payment early on Thursday morning, before the check was presented. It was admitted, on the argument, that if a check drawn upon a banker living in the same place, is presented on the day following that on which it is received, it is presented within a reasonable time: but it was contended, on the part of *1066] the plaintiffs, that if the holder of such *check wishes to procure payment of it through his bankers, he is at liberty to keep it during the day on which he receives it, to pay it into his bankers on the day after he receives it, and the bankers again may present it to the party on whom it is drawn on the day following; that is, in effect, that in such case the holder of the check has one day more for presenting the check than if he had presented it himself.

Evidence was given at the trial that it was the invariable usage for the bankers in the city not to present checks paid in by their customers until the day following that on which they are received: (a) but no evidence was given of any usage that, where the customer had received the check himself on the day before he paid it in to his bankers, and a loss ensued from the insolvency of the party on whom the check was drawn, which insolvency took place subsequently to the time at which the holder would have been bound to present it himself, such loss was borne by the drawer of the check. No case was cited, and no authority was brought before us to support the position that the drawer was bound to bear such loss. The case that came nearest to it was that of *Rickford v. Ridge*, 2 Campb. 537. In that case the holder of the check had discounted it with a banker in the

(a) Unless drawn upon bankers, eastward of St. Paul's, being members of the clearing-house, in which case they are exchanged on the same day.

country, by whom it was sent up on the day following to his London correspondents, who presented it the day after they received it, and in the mean time the party on whom it was drawn had become insolvent. But in that case, the defendant, by discounting his check in the country, must be taken to have assented to that being done which was the usual and necessary course to procure payment of the check. All the other cases cited establish only, that, in the case of a bill of exchange, one day more is allowed for giving notice of dishonour of a bill *where it is presented through a banker, than if presented by the party himself: but no case establishes that any additional time for presenting the bill for payment is allowed under *these* circumstances. [*1067]

In the absence of evidence of a course of dealing for the drawer to pay a check under circumstances like those of the present case, from which, if it existed, a contract to pay might be inferred, and in the absence of authority to show that by law he is bound to pay, we cannot feel ourselves justified in laying it down, as a rule of law, that the holder of a check is entitled to one day more for presenting it, by passing it through his bankers. Nor can we see that such rule is called for as a matter of expediency, or of pressing convenience. In the case of a check, the holder does not lose his remedy against the drawer, by reason of non-presentment within any prescribed time after taking it, unless the insolvency of the party on whom it is drawn has taken place in the interval; that is, unless there is an actual loss to the drawer. And the instances of any such loss happening by reason of the insolvency of the drawee's taking place during the additional time for presentment which is claimed and contended for on the part of the plaintiffs, are probably so very few in the course of mercantile concerns, that it can scarcely be said to be an evil calling for an extension of the time of presentment: more particularly, as the party who receives the check may always protect himself against any danger of the insolvency of the drawee, where he intends the check to pass through his bankers, by stipulating that his bankers' names shall be crossed upon the check; which would amount to an agreement on the part of the drawer of the check, that the usual course of presentment through a banker should be observed. (a)

*We therefore see no reason for holding the direction, given at the trial, to be wrong, and think the rule must be discharged. [*1068]

Rule discharged.

(a) Such an agreement might reasonably be implied, where the check proposed to be crossed was drawn, or was delivered to the payee, at too late an hour to render it probable that it was intended that it should be paid into the bankers of the payee or of some other holder, on the day on which it was received; where, however, the check is delivered to the payee in the early part of the day, the stipulation as to the crossing of the check would appear not to be inconsistent with an intention to cause it to be presented within the usual period.



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REGISTRATION CASES.

I. CASES DECIDED UPON CONSTRUCTION OF STATUTES PRIOR TO REFORM ACT.

Case upon 7 & 8 W. 3, c. 25.

1. A having contracted for the purchase of B.'s house, sold it to C., D., E., F., G., and H., in equal shares, and caused a conveyance to be executed from B. to the sub-vendees as tenants in common. It did not appear that A. was a party to the conveyance. The purchase-money was paid to B. by the hands of A., but was the money of the sub-vendees. The house was let, and the sub-vendees received the rents for their own use respectively. The object of A. in proposing the purchase to the sub-vendees was, to increase the number of votes; but the purchase on the part of the sub-vendees was a *bonâ fide* investment of their money; they expected that the possession of the property would entitle each of them to vote, but there was no understanding before or at the time of the conveyance, that they should vote in any particular way, or in support of any particular interest.

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4. Collectors of window-tax not disqualified. *Baxter, App.; Overseers of Doncaster, Resp.* 120 (a)

- b. A letter carrier not having resigned his situation until within twelve months before the 31st of July, being disqualified by 22 G. 3, c. 41, from voting until after twelve months from the resignation of such situation, is not entitled to be registered. *Cooper, App.; Harris, Resp.* 97

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Case upon sect. 20.

1. By 29 Eliz. c. 5, hospitals for the poor might be incorporated. They could previously be founded by royal license or letters-patent. Before the act A. founded a hospital for certain "Bedesmen," who were appointed for life.

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2. A., B., C., and D. join in a partnership to work a fulling mill. Money is subscribed by all the partners; with part, land is bought, which is conveyed to A. and B. in fee; with other part, a mill is built and machinery purchased. By deed, A., B., C., and D. declare the trusts of the land, mill, &c., to be (among other things) that A. and B. should stand seised and possessed for the benefit of themselves and their partners, as stock in trade; with power to A. and B. to borrow money upon mortgage; the land, mill, &c., to be personal estate. A. and B. borrowed money for partnership, giving bonds and notes in their own names, but no mortgage.

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Held, that the mortgagor might recover from the solicitor the money paid under such compulsion. *Close v. Phipps.* 586

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2. Special agreement as to release and reconveyance by mortgagee, reserving a lien thereon. *Kaye v. Dutton.* 807

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I. Where valid.

1. An invention is described in a work publicly circulated in England: a party who afterwards takes out patent for it is not the inventor, whether he derives his knowledge from such publication or not. *Stead v. Williams.* 818

II. Specification.

2. Patent for improvements in manufacture; specification describing single improvement. Held, sufficient. *Nickels v. Haslam.* 378

III. Action for infringement.

3. *Non concessit*, where a good plea in. *Bedells v. Massey.* 630
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2. Coverture of defendant, an issuable plea. *Furch v. Leake.* 377
3. Plea, traversing matter of aggravation, bad. *Griffiths v. Dunnett.* 1002
4. Duplicitv in replication. *Eonzi v. Stewart.* 746
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6. In assumpsit upon a policy alleged to have been effected by A. as agent for the plaintiff, a plea traversing A.'s agency is bad. *Kedmond v. Smith.* 457
7. So, a plea that there was no signed agreement between the master and seamen, as required by 5 & 6 W. 4, c. 19. *Ibid.*
8. *Quare*, how far allegations not traversed are to be regarded as admitted for the purpose of the cause. *Fearn v. Filica.* 513
9. Insufficiency of general allegation of immorality and dishonesty pleaded to declaration on engagement to employ a governess. *Burgess v. Feaumont.* 962

10. In debt by A. against B.; B. pleaded that C. the agent of A. obtained from B. on account of the debt, a bill accepted by B. payable at a period which had not elapsed, and that A. received the bill on account of the debt. Replication, that C. received the bill without the authority of A., that A. gave notice thereof to B., and that within a reasonable time the bill was returned by B. to C. Rejoinder, that C. received the bill by the authority of A. The bill was taken without A.'s authority, and A. by letter to B. repudiated the transaction, but did not return the bill. After verdict for the defendant, the court granted a new trial, but refused to give judgment *non obstante veredicto.* *Huxley v. Bull.* Page 571

11. Where replication traverses immaterial allegation, and enough of plea remains unanswered to bar action, the proper course is, not to arrest judgment but to award repleader. *Gordon v. Ellis.* 607
12. The rule, not to award a repleader in favour of the party who made first default applies only where the issue is found *aggravant* that party. *Ibid.*

PORT.

What places are to be considered as being within the legal limits of a port. *Stockton and Darlington Railway Company v. Barrett.* 870

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2. In trover for notes detained as stolen, on granting a commission to examine witnesses, the notes were deposited with the master. A rule was subsequently made for delivering out the notes for the purpose of producing them to the witnesses, the defendant giving security for their safe return, and also depositing fac-similes. *Clinton v. Peabody.* 399
3. Warrant of attorney for confessing judgment of a particular term, or any subsequent term, no authority for entering up judgment in vacation. *Bate v. Lawrence.* 465
4. When too late to move to set aside such judgment. *Ibid.*
5. Unless it be distinctly shown that process has not come to the defendant's knowledge, the court will not set aside proceedings. *Emerson v. Brown.* 474

6. A statement that he has not been served with, or had notice of, the process, is not sufficient. *Emerson v. Brown*. Page 476
7. Bail permitted to take out of court money deposited by them, defendant dying before trial. *Palmer v. Reiffenstein*. 641
8. Setting off judgments in different courts. *Bristow v. Needham*. 648
9. Service of writ of summons more than 200 yards from boundary of county. *Martin v. Gray*. 650
10. Peremptory undertaking to try, held by two judges to be an absolute engagement, admitting of no excuse. *Petrie v. Cullen*. 1020
11. A plaintiff allowed by rule absolute in first instance to proceed *in forma pauperis*, in suit already commenced. *Hall v. Ives*. 1001
12. Affidavit for distringas must show calls at dwelling-house. *Russell v. Knowles*. 1001
13. Service of a rule to compute upon clerk at counting-house, insufficient. *Warwick v. Bacon*. 961
14. Entry of continuances to avoid statute of limitations. *Harper v. Phillips*. 397
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17. Execution ordered to issue *forthwith*, is to issue in the ordinary course of the office. *Snooks v. Smith*. 528
18. Variance between writ of *capias* and paper served as a copy of the writ. *Copley v. Medeiros*. 426
19. Refusal of court to interfere to prevent issues in fact being tried before argument of issues in law. *Roberts v. Taylor*. 659

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1. As to entering up satisfaction. 323

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Payment of rent after action brought, to stranger claiming under plaintiff. *Boodle v. Cambell*. 386

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See PRACTICE, 8.

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Goods are taken by special bailiffs under attachment to compel appearance in county court; appearance being entered, the sheriff issues a supersedeas commanding the bailiffs to return the goods, which they refuse to do. Held, not a conversion by sheriff. *Brown v. Copley, Bart*. 558

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See PLEADING, 7. STATUTE, 7. STOPPAGE IN TRANSITU, 1. TROVER, 1.

1. What a sufficient landlug to discharge ship-owner. *Bourne v. Galliffe*. 850
2. Reasonable detention on a seeking adventure. *Phillips v. Irving*. 325
3. Liability of part-owner for repairs after contract of sale and before bill of sale executed. *Curling v. Robertson*. 336
4. Part-ownership pleaded to an action of replevin. 404, (c)
- 5 Whether passage-money of cabin passengers to be considered as freight. *Lewis v. Marshall*. 739

STATUTE.

See PLEADING, 7.

1. Ruled by Thorpe, C. J., (temp. Edw. III.) to be good without assent of Commons. Page 455, (d)
2. But ruled also by him that parties were not bound to take notice of an act until it had been proclaimed in the county court. *Ibid.*
3. Rights of inhabitants who give notice of a disorderly house. *Burgess v. Boetefeur*. 481
4. Construction of clause exempting from liability to assessment. *Todd v. London and South Western Railway Company*. 366
5. Construction of toll clauses to be in favour of public. *Stockton and Darlington Railway Company v. Farrett*. 870
6. Proviso giving costs to defendant where jury, upon the trial of the cause, find damages under 40s., does not apply to judgments by default. *Waller v. Deane*. 936
7. What, a shipping for the purpose of exportation. *Stockton and Darlington Railway Company v. Barrett*. 870

STET PROCESSUS.

See BANKRUPT, 3.

STOPPAGE IN TRANSITU.

- I. *At what period.*
1. B. sold to A. wheat, the price to be paid by banker's draft on London at two months, to be remitted on receipt of invoice and bill of lading, which B. shipped by order of A., to be carried to M., for the account and at the risk of A., there to be delivered to A.; B. delivered the wheat to the master of the vessel, signed a bill of lading to the order of B., which B. endorsed to A., B. sent the bill of lading to A. in a letter requiring A. to remit in course. A. failing to remit, B. assumed to revoke and rescind the sale, and stopped the wheat.

Held, reversing the judgment of the Common Pleas, that by the delivery to the master, and the transmission of the endorsed bill of lading, B. had parted with the property and right of possession. *Wilmshurst v. Bowker*. 882

2. Effect of part payment, where contract not entire. *Jenkyns v. Osborne*. 678
3. What a constructive delivery, putting an end to vendor's lien. *Lackington v. Ather-ton*. 360

SUBPŒNA.

See PRACTICE, 1.

SUPERSEDEAS.

See SHERIFF.

TOLLS.

See STATUTE, 4.

TRESPASS.

See PLEADING, 3.

1. It was agreed, upon a demise from A. to B. that if rent was in arrear, A. might re-enter and plead leave and license. Leave and license may be pleaded to an action for breaking and entering and assaulting B. *Kavanagh v. Gudge*. Page 316
2. The assault, if relied on, must be new assigned. *Ibid*

TRIAL BY PROVISIO.

See BANKRUPT.

TROVER.

See PRACTICE, 2.

I. Title of plaintiff.

1. Right of ship-owner to recover, in respect of his possession of, and special property in, the cargo. *Brockbank v. Anderson*. 295
- II. Conversion by defendant.

2. Refusal, upon demand, on the ground of a claim made by a third party, is evidence of a conversion. *Counce v. Spanton*. 903

TRUSTEE.

See MONEY HAD AND RECEIVED.

VARIANCE.

See PRACTICE, 18.

VENDOR AND PURCHASER.

See SHIP, 3. STOPPAGE IN TRANSITU.

WARRANT OF ATTORNEY.

See PRACTICE, 3, 4.

WILL.

See DEVISE.

WRIT OF RIGHT.

1. A writ by journeys-accounts issued after the 31st of December, 1834, is not warranted by a writ pending on that day, but since abated by the death of the tenant. *Davies, dem.; Lowndes, (heir of Lowndes.)* ten. 762
2. But the proceedings appearing upon the face of the count, the court refused to set aside a *grand cape*, leaving the tenant to demur. *Davies, dem.; Lowndes (heir of Lowndes.)* ten. 762
3. *Quære*, whether process by journeys-accounts could be taken out after the death of a sole tenant. *Ibid.*
4. Other pleas cannot be pleaded by the tenant together with the general mise. *Ibid.*

WRIT OF TRIAL.

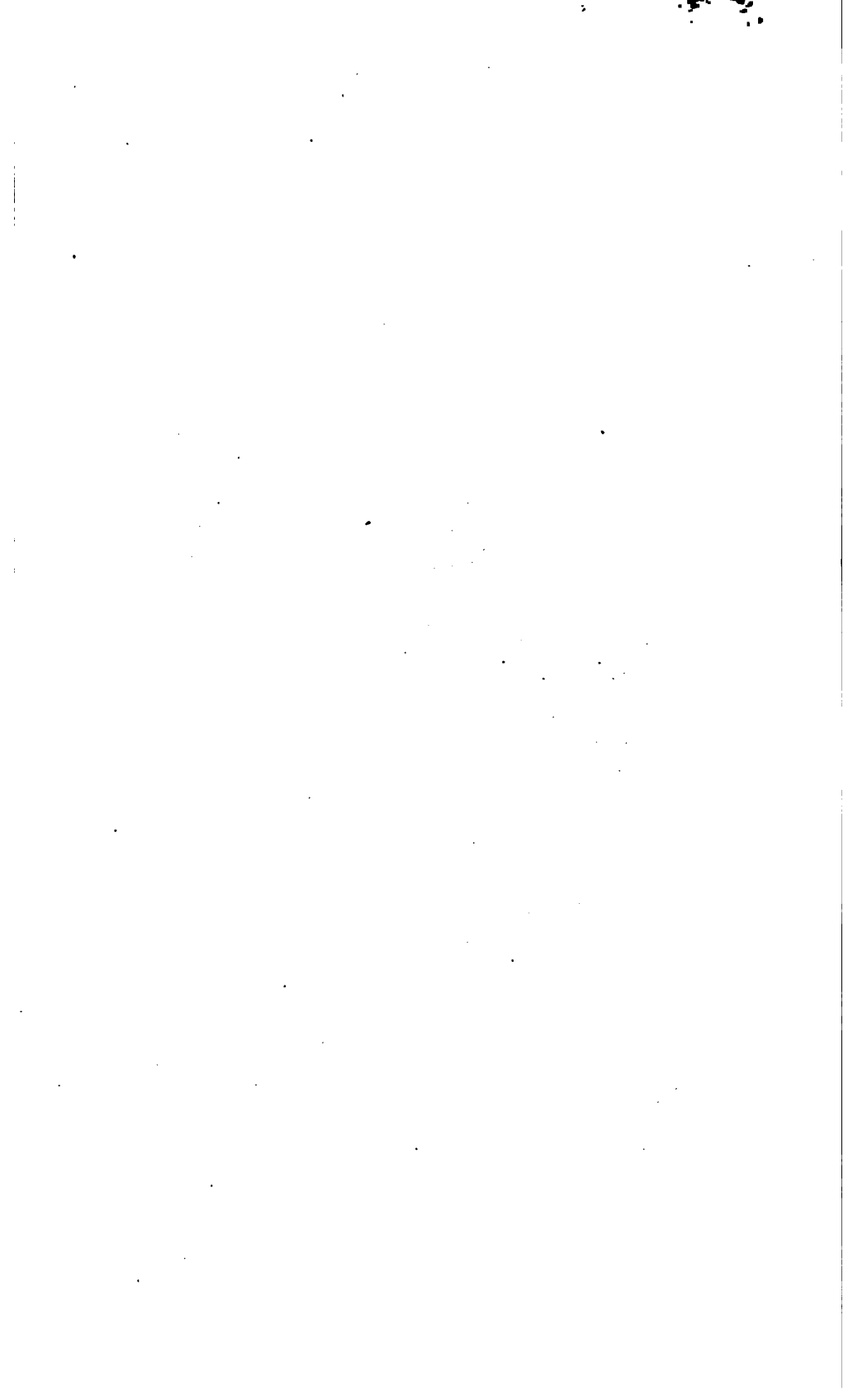
Irregularity. *Harper v. Phillips*.

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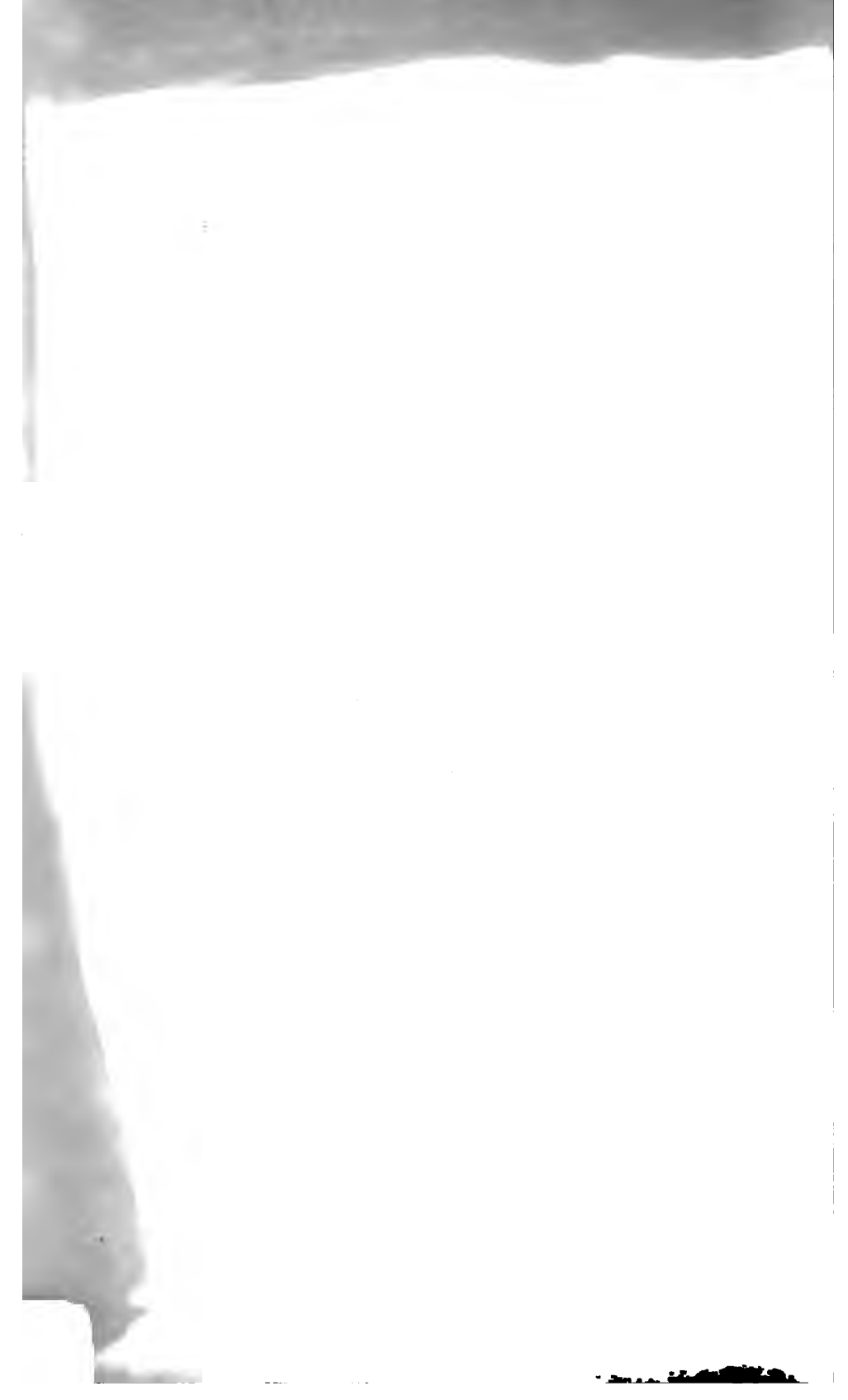












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